

**LEGAL ASPECTS OF COLLECTIVE AGREEMENTS**

by

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## ABSTRACT OF THESIS (Regulation 7.9)

This study has a number of aims. It is intended to explore the historical development of the law relating to collective agreements. At the same time this will be set against the general development of British Labour Law. The current law of collective agreements will be critically evaluated. The study then moves on to take a brief look at the position in the US and Canada. Finally, the issue of future developments is raised and the implications reforms would have for adjudication are discussed. The industrial relations background is also raised and the question of whether legal enforcement between the collective parties is now a realistic option analysed.



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## CHAPTER 1

### THE DEVELOPMENT OF LABOUR LAW - 1867-1906

In 1867 a Royal Commission on trade unions was appointed.<sup>1</sup> The appointment followed the 'Sheffield outrages': '... the culmination of a long series of acts of violence directed against non-unionists in the Sheffield cutlery trades'.<sup>2</sup> At the end of the day "two reports were issued. The Majority Report was 'an inconclusive and somewhat inconsistent document', which saw little value in trade unions for society in general, or even for the workers themselves, but argued for some legal protection of organisations whose rules were free from such restrictive clauses as those limiting the number of apprentices and the use of machinery, or prohibiting piecework and subcontracting".<sup>3</sup> The Minority Report was much more sympathetic to trade unionism.

#### The Royal Commission on Trade Unions and the 1871 Act

Much of the discussion in the Royal Commission report on Trade Unions of 1869 centres on the legal status of trade unions in society. For the purposes of the present study interest in this discussion is prompted by two factors. Firstly, proposals as to the legal status and capacity of trade unions, such as incorporation, are directly related to the legal standing of collective agreements. Secondly, the policy view taken as to the role of law in labour relations and, in particular, trade union affairs is of interest in so far as it sheds light on the "voluntarist" tradition. It was, however, the minority report

which the 1871 Act was largely modelled on and I will place more emphasis on that.

The Report is dominated by the ideas and values of the then prevalent laissez-faire philosophy. Within that philosophy a number of tensions existed. In particular, Dicey has pointed to the fact that "... utilitarians ... had not given sufficient attention to the difficulty of combining the contractual freedom of each individual when acting alone with that unlimited right of association which, from one point of view, is a main element of individual freedom".<sup>4</sup> To restrict freedom of association is to curtail the contractual power of individuals. On the other hand, the exercise of freedom of association may restrict the contractual freedom of the individuals contracting for the future and their concerted action may interfere with the freedom of third parties.<sup>5</sup> The minority report (and the subsequent Act) represent a move towards favouring freedom of combination.

Two reasons might be suggested by way of explanation. Firstly, there may have been a general tendency at this time to place greater emphasis on freedom of contract.<sup>6</sup> Heydon quotes an 1875 judgment of Jessel, MR which expresses a concern lest contracts be held void as against public policy and continues "... contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."<sup>7</sup>

Secondly, there may have been a realisation that whatever the theoretical neutrality of laws against combination their impact was by and large suffered by labour, not capital.<sup>8</sup> Accordingly, it

was time to concede to the forces of labour the right of combination. Also helping in this direction was a growing intellectual rejection of an important facet of classical economics: the wages fund. It was becoming increasingly accepted that trade unions had a role to play in setting wage levels and even that the existence and exercise of collective force was essential if the bargaining power of employees was to increase. To exercise the right of combination was, therefore, carrying with it greater legitimacy.

Let us now look at the policy behind the 1871 Act in more detail. At common law 'Whatever doubt there may have been as to the effect of the doctrine of restraint of trade upon the position of trade unions in criminal law, its effect upon their civil status was sufficiently clear. As combinations for imposing restraints which the court considered unreasonable, they were unlawful bodies to whose agreements and trusts the law would afford no protection.'<sup>10</sup>

Both the majority and minority reports favoured the legitimisation of trade unionism. The majority of the Commission had recommended that : "... facilities should be granted for such registration as will give to the unions capacity for rights and duties resembling in some degree that of corporations."<sup>11</sup> Such registration would be contingent on the union constitution containing no objects regarded as objectionable (e.g. the object of preventing workmen from working in common with men not members of the union). The minority, on the other hand, rejected incorporation and believed that the State should accord "... to them bare legal recognition

under the condition of ample publicity. They would thus be secured against robbery and enabled to protect their property, but would have no other assistance in enforcing contributions or managing their affairs. In return for this recognition a guarantee of perfect publicity in their laws and in their expenditure would be exacted, but these would in no way be interfered with so long as they were clear from crime."<sup>12</sup>

A number of reasons for this stance can be gleaned from the report. Then, as now, there was no consensus in society as to the legitimate role of trade unions. "... the conditions on which alone the public would give the full aid of the law to the unions to recover their contributions would be such as few unions would accept."<sup>12</sup> The highly tendentious nature of Labour law was noted by one judge who declared:

'By the expression that a thing is "contrary to public policy" I understand that it is meant that it is opposed to the welfare of the community at large. I can see that the maintenance of strikes may be against the interests of employers, because they may be thereby forced to yield, at their own expense, a larger share of profit or other advantage to the employed; but I have no means of judicially determining that this is contrary to the interests of the whole community; and I think that in deciding that it is, and therefore, that any act done in its furtherance is illegal, we should be basing our judgment, not on recognised legal principles, but on the opinion of one of the contending schools of political economists.'<sup>14</sup>

Accordingly the minority believed in a minimum of control over the objects, rules and other aspects of the internal affairs of trade unions, a minimalist approach being adopted of necessity; the absence of consensus meaning that a detailed legal régime for trade unions would not be possible. The minority report was nevertheless a clear endorsement of the legitimacy of trade union functions. Secondly, the minority regarded trade unions as voluntary associations. In the words of the report "Trade Unions are essentially clubs and not trading companies, and we think that the degree of regulation possible in the case of the latter is not possible in the case of the former. All questions of crime apart, the objects which they aim, the rights which they claim and the liabilities which they incur, are for the most part, it seems to us, such as courts of law should neither enforce, nor modify nor annul. They should rest entirely on consent."<sup>15</sup>

The report contains little discussion as to the regulation of collective bargaining. This is scarcely surprising since during much of the nineteenth century employers continued to determine terms and conditions of employment unilaterally. Collective agreements were therefore thin on the ground; partly it must be said because of unilateral action on the part of employees. For example, 'In the craft industries ... employers ... had given the lead towards collective bargaining, and some of the national agreements represented a joint victory for employers and trade union leaders over the hostility of a rank and file which was still wedded to the traditions of unilateral regulation.'<sup>17</sup>

In keeping with the libertarian philosophy of the times neither the

majority nor the minority sought to compel legal regulation of collective bargaining, the majority, for example, stating that "it does not appear to us that any system of compulsory arbitration is practicable, since there are no admitted principles of decision on which the arbitrator may proceed ...".<sup>18</sup> The Commission placed its faith in the institutionalisation of conflict through the workings of joint institutions. Collective bargaining and its product, the collective agreement, were more likely to produce stable industrial relations. Thus the minority found that "... where a distinct code of rules exists, no questions appear to arise but those of interpretation and we find the employers on perfectly amicable footing with the union, and both parties often co-operating with each other."<sup>19</sup> Moreover, "... (the) addition of boards of arbitration... appears to us the nearest solution of the labour and employment question which has yet shown itself."<sup>20</sup> This view as to the benefits of joint regulation was evidently shared by the government. Hughes, remarking in the Commons that '... the existence of these unions as legal associations would greatly help the system of arbitration which had done so much to settle disputes between the employer and the employed ...'.<sup>21</sup>

The minority also dwelt briefly on the subject of legal enforceability of jointly agreed terms, awards, etc. Prior to 1871 the legal status of trade unions would have prevented any legal enforcement of collective agreements. The minority believed that "... it is expedient to declare that whilst all combinations of workmen untainted with a criminal purpose are lawful, certain agreements to be defined, will not be directly enforceable at law ...".<sup>22</sup> At the same time while it would be "...inexpedient to give



any legislative character to courts of conciliation or arbitration; ... it is expedient to give increased facilities in cases where regulations exist under mutual agreement for the enforcement of the contract against either party who has bona fide accepted it."<sup>23</sup> Such a recommendation had a certain logic to it. In a society where freedom of contract was a cornerstone of the dominant ideology there must have been a reluctance to do anything but allow the parties to the agreement to endow it with legal force. Moreover, the implementation of the recommendation would be a legislative endorsement of the value of joint regulation. On the other hand, it was not difficult to foresee potential difficulties. If it was politically unacceptable to allow a union to enjoin workmen from going to work it would be difficult to countenance a union suing an employer for breach of a collective agreement through the employment of non-unionists.

### The 1871 Act

To implement the Commission's aim of legitimising trade unions section three of the 1871 Act provided that "... the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust". Section four of the Act was to restrict enforcement of trade union agreements. Henceforth, trade unions were to be free to combine unhampered by the doctrine of restraint of trade. The recognition by the law of the right to combine was partly motivated by an awareness of the weakness of the bargaining power of the individual employee and his consequent dependence on association with his fellows to improve his lot. As pointed out in parliamentary debate: "Employers of labour were in themselves a

great combination, and there ought to be a great countervailing power permitted to the employed to guard their own interests".<sup>24</sup> In line with the minority's recommendation, full incorporation was not favoured.

As we have seen, the minority believed in a régime whereby minimal control over trade union internal affairs would be exercised by parliament or the courts. S 4 of the 1871 Act prevented any court from entertaining "... any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of ... (a number of specified agreements) ...". The proposer of the bill, explained that "If such contracts were enforceable, our Courts of Equity might be called upon to enjoin masters against opening their works, or workmen from going to work, or discontinuing a strike; whilst our County Courts would have to make decrees for contributions to strike, or to enforce penalties from workmen who had felt it their duty to resume employment."<sup>25</sup> The lack of an underlying consensus as to the development of Labour law again played its part. The making and carrying out of the agreements enumerated was not prohibited; instead, trade unions were to be denied access to the courts to enforce such agreements and were confined to the use of social sanctions. Another possible factor was that if trade unions were to be exempt from the general law of restraint of trade the consideration for this should be restricted access to judicial proceedings.

It is important to note at this stage the role of the English positivists. Harrison has written that "... they played a decisive part in securing a satisfactory legal basis for trade

unionism. They formulated trade unionists demands and - in the end - the Government's own measures".<sup>27</sup> "It was ... [their] ... ingenious suggestion that unions should enjoy the protection of the Friendly Societies Acts while acquiring the privilege of being incapable of being sued or proceeded against as a corporate entity. The positivists had to work hard to explain to Trade Unionists that mere legalisation would expose them to endless litigation and end in crippling them."<sup>28</sup> Sections 3 and 4 of the Act were based on the minority's recommendation that the legal enforcement of certain trade union agreements be restricted.

Curiously s 4 of the 1871 Act only affected agreements between a trade union and an employer's association. Gayler has stated:

"How far the legislature intended this result is difficult to say. Although a definition of the term 'trade union' to include an employers' association is not usual, nevertheless the legislative intention to include that type of association within the definition can hardly be denied. But an examination of the agreements set out in section 4, together with the views of the Royal Commission of 1869, must lead us to the conclusion that, so far as section 4 is concerned, it was merely the intention of the legislature to put union 'domestic' agreements outside the purview of the courts. It was the intention of the legislature that the courts should not interfere with the payment of benefits, imposition of fines and so forth. By the phrase 'any agreement between one trade union and another' the draftsman probably meant an agreement between one workers' union and another workers' union as to membership, terms of apprenticeship,

lines of demarcation, amalgamation, etc. It cannot be believed that he had in view a collective agreement between an employers' association and a workers' trade union. This may be first deduced from the fact that multi-party bargaining was not very common in the seventies. If the legislature was trying to stop the slow growth of industry-wide bargaining, it would have been a little more explicit. Secondly, and perhaps alternately, if it had been the intention of the legislature to let collective agreements be merely 'gentlemen's agreements', provision would have been made for agreements made between a single employer and a workers' trade union."<sup>29</sup>

The failure to give legal effect to collective agreements between trade unions and employers' associations may therefore have been accidental.

Let us now try and assess the state of Labour Law policy after the 1871 Trade Union Act. The premise of the legislation might be thought to be a recognition of the right to combine so that the forces of labour might be able to stand against capital. Consequently, various legal obstacles would have to be removed. On the other hand, no use would be made of the law to redress any imbalance in the power of the opposing social forces: "... absolute impartiality appears to us to be the only safe rule for the State."<sup>30</sup> Similarly, any interference with the operation of the labour market, such as compulsory arbitration, was ruled out. It was hoped that conflict might be reduced through the voluntary use of joint regulation. In a society where freedom of contract

was promoted the minority desire for the facilitation of legal enforceability of collective bargains was understandable.

With respect to the legal status of trade unions there was to be no incorporation. To lay down positively the terms upon which incorporation would be granted would be too controversial. Moreover, in a laissez-faire world, to disallow objects of a voluntary association was seen as undesirable: "... it is not the duty of the State ... to punish unsocial conduct, and that such part of the conduct of the unions as is unsocial without being criminal ought not in good policy to be visited by legislative disabilities or penalties."<sup>31</sup> Again, as discussed, it was felt desirable to restrict access to the courts. The implementation of this restriction in the form of s.4 was rather at odds with the desire to facilitate optional legal enforceability of collective agreements.

While the minority report and the parliamentary debates both contain references to the value of a policy of State neutrality it would be erroneous to assume that a policy of non-intervention can be equated with neutrality. At any one time the balance of social and economic forces may be heavily in favour of one class in society. Accordingly, to omit to redress the balance by legislative intervention is to favour one class. The legislation of 1871 permitted a relatively free hand to the monopoly forces of capital and labour but this was scarcely a policy of neutrality.

#### The Royal Commission of 1892

A Royal Commission on labour was set up in 1891 '... to enquire into

the relations between capital and labour with a view to their improvement'.<sup>32</sup> It followed concern over the unrest associated with the rise of 'New Unionism'.<sup>33</sup> However, '... the unrest subsisted before the commission reported and the majority report declared relations to be at their best when both sides were well organised and negotiation was facilitated by voluntary collective bargaining procedures'.<sup>34</sup> More far-reaching reports have been known to emanate from Royal Commissions; "The majority of the Commissioners ... contented themselves with deprecating, and mildly arguing against, every one of the projects of reform that were then in the air."<sup>35</sup>

The premise of the report, based on the belief of both sides of industry, was that the route to industrial peace lay through collective bargaining: "... where a skilled trade is well organised, good relations tend to prevail and countless minor quarrels are obviated or nipped in the bud",<sup>36</sup> It was not imagined that industrial conflict could be eliminated, merely that joint regulation would produce greater stability. Despite the fact that the Commission believed that "... where both sides in an industry are strongly organised and in possession of considerable financial resources, a trade conflict when it does occur, may be on a very large scale, very protracted and very costly".<sup>37</sup>

It is interesting to note that the Commissioners believed that strong organisation on both sides and a "fairly equal" balance of power were pre-requisites of successful joint regulation. While in 1867 there had been some understanding of the need for strong organisation there was little understanding of the need for a

balance of power. Two reasons might be offered. First, joint regulation was very much in its infancy in 1867 and the role of the balance of power in producing stable industrial relations would be unlikely to be perceived. Second, any notion of balance in a matter to be settled by market forces would be difficult to reconcile with the tenets of economic liberalism.

The conduct of industrial relations varied greatly at this time; the use of sliding scales and wages boards being much discussed. Wages boards were "... to be distinguished both from more occasional meetings or conferences between representatives or committees of employers and employed in a trade for the purpose of discussing wage rates or other points at issue, and from the joint committees which are frequently constituted in trades for the purpose of hearing and determining in a judicial manner questions arising between individual employers and those whom they employ. The object of a true wages board is to prevent conflicts by means of periodical and organised meetings of representatives of employers and employed for the purpose of discussing and revising general wage rates in accordance with the changing circumstances of the time."<sup>38</sup> The number of such boards was distinctly limited in the 1890s.

If joint regulation was a worthy aspiration it is not surprising that the Commission looked at ways in which existing institutions could be developed and improved, particular attention being paid to modes of conciliation and arbitration. Of a number of points which arise for discussion one of the more interesting is the treatment of the distinction between conflicts of rights and



conflicts of interest. The majority viewed conflicts of rights as adjudicable matters; such issues "... being for the most part connected with the application of rules already recognised, can usually be dealt with and settled, upon the ascertainment of facts, without much difficulty by simple methods or institutions of a judicial kind."<sup>39</sup> Where a wages board existed a standing committee might be established to deal with such questions; in the absence of a wages board a joint committee of employers and employees might be set up to deal solely with rights issues. Similarly, for the Webbs "rights" issues were highly adjudicable. They believed that when the application of an agreement was the question at issue "... the settlement should be automatic, rapid and inexpensive. The ideal machinery for this class of cases would, in fact, be a peripatetic calculating machine."<sup>40</sup> When it came to conflicts of interest it was noted that "... the method of judicial arbitration has, as experience shows, not yet been successfully applied to this class of questions, except under special circumstances and in a few industries ...".<sup>41</sup> The majority believed that the reason for this was because "such questions are in fact not suitable for judicial decision. They are questions of practical politics in which the relative strength of the opposite parties is an element that can hardly be left out of account".<sup>42</sup> The minority believed the explanation to be even more fundamental and one that lay in the realm of disputes over questions of political economy: "The points at issue are not such as admit of decision upon any principles which both sides admit."<sup>43</sup>

In fact, arbitration over conflicts of interest would present a number of difficulties: "... even where there is a disposition on



both sides to refer to arbitration, there is often a difficulty in finding suitable arbitration or umpires. Either the arbitrator is quite unconnected with industrial work, and then the process of informing his mind upon the matter is too long and costly, or he is in some way connected with the industrial world, and then one party or the other is apt to suspect him of bias and partiality".<sup>44</sup> Moreover, the respective bargaining power of the parties often meant that one side would have considerably more interest than the other in making use of an independent arbitrator. In the words of the Commission, "in cases where very strong organisation enables the workmen fully to hold their own, and even gives them advantages in bargaining, they are the more apt to be averse to arbitration by individuals regarding these general questions, while employers are more disposed to resort to it. Certainly the desire for arbitration on general questions, and especially, for some form of State arbitration, seems usually to be stronger among workmen of poorly organised trades."<sup>45</sup>

The Commission devoted a considerable amount of time to canvassing various legal solutions. One issue discussed was the legal status of collective agreements, the Commission believing that a combination of a lack of legal personality on the part of a trade union and the effect of s 4(4) prevented collective agreements from being legally enforceable. The Commissioners considered proposals which would have allowed trade unions and employer's associations to "... be able by registration to acquire legal personality and to enter into industrial agreements for specific terms, enforceable by monetary penalties of a limited amount upon the organisations parties to it, and upon other persons at any time during the term

of the agreement members of such organisations".<sup>46</sup> In the eyes of the Commissioners the acid test for the use of the law would be in its potential value for securing greater adhesion to collectively agreed terms. More particularly, would the respective organisations be able to control their memberships? For example, the question was posed as to whether an organisation "... would continue to be liable for any breach of agreement by those who had ceased to be members".<sup>47</sup> The report continues: "This is an important point; for though it would certainly seem a strong measure to make an association legally responsible for the conduct of persons who were no longer its members, on the other hand if this was not done the scheme hardly appears to dispose of the old difficulty of enforcing legal penalties against a mass of working men".<sup>48</sup> However, a paradox arose in that in the strongly organised trades "... agreements are, as matters stand now, best observed, even without any right to sue for compensation, while on the other hand a weak and poor union, even if endowed with legal personality, and made legally responsible for any breach of agreement by the persons who had ceased to be members of it, would constitute but a feeble guarantee to employers that the terms of the agreements would be loyally observed".<sup>49</sup> Ultimately, therefore, the report did not recommend facilitating legal enforcement; it was most needed where organisation was weak but equally that was where it was least likely to be effective.

Some of the Commissioners were more inclined to facilitate legal enforcement - as is clear from their observations appended to the report - and it is interesting to assess their position. They believed "... that the extension of liberty to bodies of workmen or

employers to acquire fuller legal personality than that which they at present possess is desirable in order to afford, when both parties wish it, the means of securing the observance, at least for fixed periods, of ... collective agreements ...",<sup>50</sup> one reason for this being the view that it would "... result in the better observance for definite periods of agreements ... (and) ... would also afford a better basis for arbitration in industrial disputes than any which has yet been suggested".<sup>51</sup> More interestingly, the view was expressed that "... further legislation is desirable in order to bring the law into harmony with the present state of facts and public opinion".<sup>52</sup> Since 1871 there had been an increasing acceptance of collective bargaining and trade unionism: collective agreements are "... on the whole, in accordance with the public interest and with the circumstances of modern industry".<sup>53</sup> To move towards treating such agreements in the same fashion as other contracts would be a recognition of the value placed on conducting industrial relations by joint regulation. Similarly collective agreements "... would be subject, like agreements between individuals, to the restrictions flowing from the common law doctrine in discountenancing restraint of trade".<sup>54</sup> Nevertheless, the final conclusion of this body of Commissioners was that "The evidence does not show that public opinion is as yet ripe for the changes in the legal status of Trade Associations which we have suggested; but we have thought it to be desirable to indicate what may... ultimately prove to be the most natural and reasonable solution of some at least of the difficulties which have been brought to our notice".<sup>55</sup>

The Commission also considered whether special tribunals should be

set up to deal with cases involving employment contracts. In rejecting such proposals the same pragmatism was demonstrated that appeared in the discussion of the legal enforceability of collective agreements. Thus the establishment of such tribunals would be of limited value since "... in this country, the only disputes which lead to serious actual conflict are those relating to the terms, not of existing, but of future agreements."<sup>56</sup> In addition, there appears to have been a prejudice against any type of legislative intervention. Here, for example, all that was at stake was ease of access to the courts. There was no question of seeking to regulate collective bargaining by law. Yet the report was quite content to rely on the power of social forces to guard the interests of employees, it being noted that "... in large and well organised trades the employees have already quite sufficient means of obtaining remedy for grievances connected with existing or implied agreements or trade customs".<sup>57</sup> Quite consistently social power would not be legally reinforced even where it was manifestly unable to protect workers. So "... in unorganised occupations, especially in the case of unskilled labour, a dispute on questions of this kind is more likely to be terminated by cessation of the engagement between an employer and an employee than by a resort to any tribunal however constituted."<sup>58</sup>

Various suggestions as to compulsory arbitration were aired and the Commission considered suggestions such that strikes and lock-outs should be unlawful unless arbitration had been resorted to. This ran up against the practical obstacle of finding a method to enforce a law prohibiting strikes and lock-outs against large bodies of employees and employers. Following their view

concerning facilitating legal enforceability of collective agreements a number of the Commission appended observations with the aim of encouraging arbitration backed by legal sanctions. However, it seemed to them "... to be obvious (1) that the State cannot compel either individuals or bodies of men to enter into agreements; and (2) that the State cannot compel employers to give employment or workmen to do work upon terms which they do not respectively accept. In as much as lock-outs and strikes are, in practice, the assertion of these essential liberties on the part of employers and workmen, it is clear that the State cannot prohibit acts of this kind and compel the parties to resort to tribunals of any sort instead".<sup>59</sup> It was felt that if trade unions could secure legal personality they could voluntarily enter into legally binding contracts to submit present or future questions to arbitration, the hope being expressed that if "... a more concrete guarantee was given to arbitration, it would be more frequently resorted to by those who have a bona fide preference for it over more violent modes of settling differences".<sup>60</sup>

Finally, it falls to be considered what the Commission actually did recommend (it may be noted that four of the seven trade unionists signed a minority report). The Commission commended the work done by the Labour Department of the Board of Trade and wished to see its expansion. Their main recommendation was that legislation should endow the Board of Trade with discretionary powers with regard to conciliation and arbitration in trade disputes. This was to be embodied in the Conciliation Act, 1896. It is vital to note that, under the Act, an arbitrator or conciliator could only be appointed on the application of both parties.

The Commission was, therefore, adamantly opposed to the legal regulation of collective bargaining. All it was prepared to offer to the two sides of industry were certain facilities which they could utilise if they wished. This approach had both a pragmatic and an ideological basis. The pragmatic base stemmed from the fact that the conduct of industrial relations by voluntary collective bargaining was, in fact, conducive to industrial peace. The ideological basis, on the other hand, was rooted in an aversion to State intervention (this aversion not being confined to the sphere of industrial relations). Cole, in his discussion of the labour movement in the 1880's, notes that "... Trade Unionism, under the control of the older leaders, had surrendered completely to laissez-faire ideas, just at the time when these ideas were wearing out in the face of the changing conditions of trade and industry. The leaders, with a few exceptions, were as vehement as the employers against State interference, and believed in settling all issues by conciliation based on the assumption that the real interests of capital and labour were the same".<sup>61</sup> Six of the seven trade unionists on the Commission belonged to the "old school" (though only three trade unionists signed the majority report). While Dicey believed that this period of time bore witness to a decline in the popular authority of the doctrine of laissez-faire the report is still very much in keeping with that doctrine.

An indication of the continued influence of laissez-faire is given by the comments of the Commission as to the dangers of employer and trade unions "... combining together to control an industry injuriously to the public interest".<sup>62</sup> The report simply states that "... it may be hoped that such combinations would in the end



either fall from within or be defeated by competition arising from unexpected quarters or be destroyed by changes in methods of production".<sup>63</sup> Nevertheless, the influence of laissez-faire was definitely on the wane. In the House of Commons in 1895 Mundella justified the need for a Conciliation Bill on the basis of the damage to the public interest arising from the economic harm caused by trade disputes.

It is clear from the observations appended to the report that a significant section of the majority would have regarded greater legalisation of industrial relations as a natural development. Thus they wished to facilitate the conclusion of legally enforceable collective agreements. Whereas the report was to recommend the use of certain statutory based facilities there were those who wished to facilitate an increase in the resort to law. It is vital to appreciate that they did not wish to see the use of the law made compulsory. They adhered to the tenets of laissez-faire but equally saw no reason why the law should abstain from industrial relations.

It deserves to be pointed out that the discretionary powers in respect of conciliation and arbitration recommended by the Commission would already have been within the authority of the Board of Trade. It being felt, though, that legislation would give the Board greater authority: "This Bill would enable them to say to the parties: 'The legislature thinks it our duty to place the matter fairly before you'".<sup>65</sup> The envisaged legislation was seen as an avowal of State policy that joint regulation, assisted where necessary by conciliation or arbitration, was the way ahead.

Interestingly enough, many people at this time seem to have viewed "public opinion" as a neutral force but at the same time as a potent weapon that could be deployed to help resolve disputes. Thus one MP stated - "Neither side to a great industrial dispute could carry on the conflict long if the force of public opinion was against them; but there was the difficulty of forming an intelligent and well instructed public opinion. If there could be an authoritative body - a body whom the public could trust - to make a report as to what ought to be done in the future, much would be done to bring a conflict to a termination."<sup>66</sup>

Dicey saw the Commission's policy as having important consequences in the longer term. "We have reached a merely transitory stage in the effort of the State to act as arbitrator. The attempt, if not given up, must be carried out to its logical conclusion, and assume the shape of compulsory arbitration which is a mere euphemism for the regulation of labour by the State, acting probably through the courts".<sup>67</sup> Certainly some trade unions were in favour of compulsory arbitration at this time. The unions concerned belonged to areas where labour organisation was weak and what, in fact, was probably desired was legal regulation of wages. Where trade unionism was stronger compulsory arbitration was unlikely to be in demand. (See above, pp 18-19.) Employers too were unlikely to be in favour, viewing it both as an infringement of their 'right to manage' and "... on its economic side, as indefensible an interference with industrial freedom as a legal fixing of wage rates".<sup>69</sup>

The Commissioners, therefore, placed their faith firmly in the



institutions of voluntary collective bargaining, the view being expressed that "... the custom ... (of collective bargaining) ... may become so strong, even without assistance from law, as to afford in such trades an almost certain and practically sufficient guarantee for the carrying out of industrial agreements and awards".<sup>70</sup> Moreover, it was hoped that the extension of voluntary boards would continue.

The signatories to the minority report wished to see much greater state intervention in society to better the working and living conditions of the working class. To this end they desired greater legal regulation in the area of employment just as much as they did when it came to housing, etc. They wished to see legislation preventing manual workers from being employed for more than 8 hours a day. A demand which had become part of the policy by 1890. Again a number of adherents of 'New Trade Unionism' wished a minimum wage to be established by legislative fiat. This desire for greater state intervention was not shared by trade unionists of the older school. Thus we find Howell adamantly stating that '... an interference with the hours of adult male labour, ... is outside the domain of law'.<sup>73</sup> The minority were opposed to incorporation (though some unions would have welcomed compulsory arbitration at the time, see above p 22):

'To expose the large amalgamated societies of the country with their accumulated funds, sometimes reaching a quarter of a million sterling, to be sued for damages by any employer in any part of the country, or by any discontented member or non-unionist, for the action of some branch secretary or delegate, would be a great

injustice.<sup>74</sup>

They envisaged greater state intervention which was not in conflict with the 1871 settlement. They wished trade unions to be free to pursue their claims without fear of litigation while, at the same time, seeking greater legal protection for employees.

#### Developments in Industrial Relations

The Royal Commission of 1892 had dealt extensively with measures of reform which were often concerned with devices to reduce conflict by curbing rank and file militancy. Similarly, employers searched for ways to maintain or restore control over workplace relations. For example, from 1860 onwards the establishment of Boards of Conciliation and Arbitration became common. Such boards often met with considerable success, especially in the initial years after formation. However, "... as time passed the charm seemed to fail ... The boards belonged to the era when it was an achievement for the unions to gain recognition and take an equal part in reasoned negotiation. As industrial relations moved on to a new stage, they had less meaning to the men and less work that they could do".<sup>75</sup>

Of particular interest are the events in the Boot and Shoe industry. The early years of the 1890's witnessed considerable dissatisfaction among sections of both sides with regard to the operation of the dispute settlement machinery in the industry. To the employers two factors were proving particularly disquieting. The apparent inability of the union leadership to secure the adhesion of its membership to agreed procedure and, the quite legitimate, use of procedure to challenge the extent of managerial

prerogative. Events were to culminate in the lock-out of 1895. This lasted for nearly six weeks and resulted in a settlement favourable to the employers whereby they "... secured important limitations in the scope of collective bargaining".<sup>76</sup> What of worker discipline? The employers looked to the union to control their membership but in addition to the standard institutions of joint regulations they imposed a trust fund. The following elements of the settlement are of great interest:

"Should any provision of the Settlement, or any award, agreement, or decision be broken 'by any manufacturer or body of workmen belonging to the Federation or the National Union; and the Federation or the National Union fail within ten days either to induce such members to comply with the agreement, decision, or award, or to expel them from their organization, the Federation or the National Union shall be deemed to have broken the agreement, award, or decision'.<sup>76a</sup> The penalty for breaking an agreement, award, or decision was to be a financial one. A Guarantee Fund was set up; each side contributing £1,000. Either side could claim before the Umpire that the other side had defaulted, and should the Umpire agree, he could 'determine that all or any part' of the Guarantee Fund be forfeited to the side 'in whose favour the Award shall be made'. The side thus penalized would then have to make good the diminution of the Fund by bringing it up to its original level."<sup>77</sup>

The use of the Guarantee fund is fascinating: the agreement corresponds to a legally enforceable collective agreement with a

liquidate damages clause. The greater interest might well be thought to arise from the fact that this particular agreement was adopted without prompting from any State body and, given the time of its introduction, represented a highly innovatory move in a quasi-legal direction. On the other hand, the extent to which employers regarded the trust fund as a guarantor of industrial peace must be questioned. Fox has argued that "... the Guarantee Fund had much less significance than has often been thought. Certainly, it was guaranteed to drive Union leaders into great efforts to prevent or settle unofficial strikes of which they disapproved. But the sums involved were relatively so small that the prospect of paying even the full penalty would be hardly likely to induce Union leaders to submit on any issue which they felt to be of more than trivial importance. It could never, by itself, have secured industrial peace".<sup>78</sup> Perhaps the real threat to the power of employees in the industry was posed by the demonstration of employer power provided by the lock-out.

Subsequently, the Industrial Council commented on the Scheme in the course of their enquiry into industrial agreements.<sup>79</sup>

"If the fund is intended to be one out of which a penalty is payable equivalent to the amount of damage suffered, it is clear that, in order to provide for a case involving a large number of persons, the sum of money which it would be necessary to deposit would be such that many of the smaller organisations would be unable to set aside so large a proportion of their funds, or to obtain money for such a purpose. If, on the other hand, the

penalty to be paid is merely in the nature of a fine, it does not appear that the adoption of the principle adds much to the restraining influence which is already exercised by the moral obligation to observe agreements."<sup>80</sup>

### Taff Vale

The famous case of Taff Vale Railway Company<sup>81</sup> led to the establishment of a Royal Commission<sup>82</sup> and ultimately to the Trade Disputes Act, 1906. The latter Act, along with the Act of 1871, were to be the key components of British trade union law until, in 1971, the enactment of the Industrial Relations Act. Nevertheless, 1906 did not bear witness to a comprehensive review of the law relating to industrial relations. Both the Royal Commission report and the 1906 Act were exercises in problem-solving in the wake of Taff Vale. Thus the Commission's terms of reference obliged the members "... to enquire into the subject of Trade Disputes and Trade Combinations and as to the law affecting them ...".<sup>83</sup> The Commission refused "... to go into such general topics as were covered by the Report of the Royal Commission on Labour, 1894 ...".<sup>84</sup> In legislating Parliament was, of course, aware of the role of the right to strike in industry; given that the conduct of industrial relations through the medium of collective bargaining was regarded as successful but contingent on strong trade union organisation. The burden of litigation could severely weaken the unions, one MP declaring that "He had heard workmen say more than once that they would not continue to subscribe at personal sacrifice if the money so contributed was to be confiscated by the lawyers, or to go as technical damages ...

was the House prepared to witness the gradual decay of those great Labour associations as a result of the Taff Vale judgment".<sup>85</sup> Despite this problem-solving approach the nature of the legal solution adopted would obviously be of great significance to the development of British labour law. Essentially there were two possible avenues of reform in vogue at that time. One could restore the pre-Taff Vale position, or trade unions could be incorporated: "... the Trade Unions should forego their position of being outside the law, and should claim, instead, full rights, not only of citizenship, but actually of being duly authorised constituent parts of the social structure, lawfully fulfilling a recognised function in industrial organisation".<sup>86</sup> It was, of course, the first line of approach that was adopted and it is necessary to consider why this was favoured.

The most immediate explanation was simply that this course of action had eventually become the approach desired by the unions. Given the political influence they were able to exercise, and the strength of trade union feeling in favour of restoration, the outcome of the debate became inevitable. (One must also note '... the comparative weakness of employer's organisations which might have provided a counterweight to the influence of the unions in the Westminster lobbies and in the constituencies.'<sup>87</sup>)

Many trade unionists believed that the 1871 Act had been intended to put them "outwith the law" and that the passage of time had accorded a "prescriptive right" to this immunity. Indeed, the Attorney-General, was to state in the Commons that "... without fear of challenge from either lawyer or constitutional historian

that Parliament in 1871 or 1875 intended to create this immunity, and according to the general assent of politicians and lawyers of that date, and of a whole generation of their successors, down to the year 1901, this immunity had, in fact, existed and had authority".<sup>88</sup> The Royal Commission, though, believed "... that the law laid down by the House of Lords involved no new principle and was not inconsistent with the legislation of 1871".<sup>89</sup> Once the procedural changes of 1875 had taken place (see p 42) it became increasingly likely, in the view of the Commission, that the courts would allow a trade union to be sued.

Let us look more closely at the union insistence on restoration. Undoubtedly, distrust of the judiciary played its part; the view being expressed in the Commons that "... trade unions had very great difficulty in getting level justice in a court".<sup>90</sup> On the other hand, the underlying motivation was basically the pragmatic belief that the 1871 settlement had worked and that the sensible thing to do was to restore it (all the more so as in the light of the general feeling that the immunity was a basic right).

While undoubtedly political pressure moved the Liberal Government from its original position it requires to be considered why they were inclined to accept this. Apart from anything else they shared, to a certain extent, the views of the labour movement, though undoubtedly, on the other hand, having considerable misgivings as to the enactment of the privilege of s 4. The Government themselves had proposed to give protection against Taff Vale by restricting the law of agency's operation in relation to trade unions. One technical reason for dropping this was a desire



for clarity: "... there was less risk of actual legislation on disputed questions going to the Courts of Law, passing from one stage of appeal to another, and involving loss of temper, money and time, by adopting the perfectly simple and commonsense method embodied in the alternative clause, then if they were to lay down in regard to industrial combinations a new code of the law of agency".<sup>91</sup> Again as in 1871 it was argued that trade unions were essentially voluntary associations and while this might have become a good deal less convincing it still seems to have carried some weight.

The alternative would have been to proceed down the road to incorporation. The Royal Commission had recommended that "... facultative powers be given to Trade Unions, either (a) to become incorporated subject to proper conditions, or (b) to exclude the operation of s 4 of the 1871 Act, or of some one or more of its sub-sections, so as to allow Trade Unions to enter into enforceable agreements with other persons and with their own members".<sup>92</sup> This option was strongly favoured by employers. In terms of solving the problem caused by Taff Vale such an approach could have given the unions what they required. Incorporation could have gone alongside protection, whether in the form of a right or immunity, against simple conspiracy and inducing breach of contract. If picketing had been legalised as well trade unions would not have needed any further protection and the privilege of s 4 of the 1906 Act would have been superfluous. An argument that had proved significant in 1871 arose again; to give trade unions full legal personality would raise the controversy as to the enforcement of the union rule book. The Webbs noting that such a



move would require "... a great advance in public opinion"<sup>93</sup> and the Government certainly did not wish to see injunctions being issued against strike breakers, etc.

We have already seen that the labour movement was not in favour of incorporation. However, trade union reaction to Taff Vale had been mixed and if legislation had come earlier things might have turned out very differently. Initially, some union leaders appear to have accepted the increase in legal involvement in their organisations' activities; others may have been prepared to resign themselves to it. Indeed, Brown has stated that ... "Some unionists saw in legal liability a way of encouraging responsible behaviour or limiting rank and file militancy. It also followed that if unions could be sued as corporate entities then they could also enter into legally binding contracts, especially with employers; and to some union leaders this was quite an attractive proposition".<sup>94</sup> Bell of the Railway Servants' Union believed that strong union executives would command more respect from employers and that this would ease the passage of compulsory arbitration.<sup>95</sup> However, Brown continued by saying that "on the whole ... those major unions which had already gained recognition from employers preferred to keep the law out of industrial relations".<sup>96</sup> Again the political climate in the aftermath of Taff Vale was not over sympathetic to trade union demands and the labour movement might well have been prepared to accept any reasonable settlement. In fact the Bill introduced into Parliament in 1903, with the support of the hierarchy of the labour movement, did not give trade unions immunity in tort if the 'member or members ... acted with the directly expressed sanction and authority of the rules'.<sup>97</sup> "With

the announcement of the Royal Commission these prospects had gone. If the Government had desired to obtain a moderate bill with the consent of the unions, they could certainly have had it in 1903. Since the Government chose to reject the overtures of the union leaders, however, the latter had very little incentive to oppose the clamour of their followers for complete immunity, the 'permanent remedy'."<sup>97a</sup>

The rejection of incorporation meant that the UK was unlikely to see greater legal regulation of industrial relations. It should be noted that it would have been feasible to have modified the settlement of 1871 with the effect of increasing legal involvement. The statutory immunities could have been modified to regulate by law certain instances of industrial action. Thus the parliamentary debates contain references to moves to restrict immunity to primary strikes and to render employee-only disputes illegitimate. Such proposals tended to be rather summarily discussed and met with little enthusiasm, the discussion in Parliament being concentrated around the proposed s 4 and the law on picketing. Nevertheless, the Government expressed the view that "... the whole policy of the Bill was founded on the established right of workmen for any reason which they in their judgment thought sufficient to abstain from work... They were the best judges of that".<sup>98</sup> Much of the current controversy over the proper ambit of the purposes for which industrial action may be taken relates to so-called "political" strikes. This was not an issue in 1906 though the Government believed "... that trade disputes should be limited to those concerned with questions of employment and conditions of employment".<sup>99</sup> Their concern was

presumably to prevent personal grudges, etc, from masquerading as trade disputes.

#### CONCLUSION

By way of conclusion it is necessary to try and assess labour Law policy in the aftermath of the 1906 Act. At the end of the period 1871-1906 two features were worthy of note. First, the recognition of the benefits to be gained by conducting industrial relations through the institution of collective bargaining. Second, the lack of legal regulation of industrial relations and trade union internal affairs.

While in later years many commentators came to regard the absence of law as a virtue the position was different in 1906, Royal Commission reports, for example, tending to suggest that the law be changed to allow the parties to enforce legally collective agreements if they wished, commercial relations being seen as no different to industrial relations. While collective laissez-faire was to go hand in hand with legal abstention, economic liberalism and the use of the law were not incompatible. Recommendations as to legal changes were, however, heavily influenced by pragmatic considerations. Hence the reason that any scheme of compulsory arbitration was ultimately rejected, was because voluntary arrangements were felt to be working. On the other hand, had the government intervened to regulate by law industrial relations in the nineteenth century". ... unions might have become sufficiently accustomed to legal constraints, and sufficiently convinced of their long term benefits, to resist the temptation to cast them aside when they became strong enough to do so".<sup>1</sup> A further

instance of pragmatism is furnished by the majority in 1894 who felt that legally enforcing collective agreements would not achieve much since it would be unlikely to work where it was most needed (ie in weakly organised trades). Trade Unions too, especially those of the new school, pressed for more legislation. They were mainly interested in limiting working hours and similar protective legislation.

By the 1890's there was a greater perception of the part to be played by the balance of power between the collective parties in producing stable industrial relations but there was no question of the law intervening to redress any serious disparities. While the first Fair Wages Resolution had been passed in 1891 and Wages Boards were established in 1909 one could not rationalise their role in the way that was subsequently done. They were not established to support collective bargaining but were designed to protect employment conditions in certain sectors of industry. While some supporters of the Fair Wages Resolution undoubtedly saw it as a means of promoting the development of collective bargaining the wording of the 1891 resolution and, a fortiori, the administration thereof told a different story. The true significance of the Fair Wages Resolution for voluntarism was the reliance on administrative sanctions (which were ineffectually operated) rather than legal regulation. Bercusson has found that "Not being able to rely on the Fair Wages Resolution, and in the knowledge that they would not receive any other help in this area, the trade unions took the hard road to self-reliant collective bargaining, independent of any legal protection or privilege through government intervention",<sup>2</sup> the function of the resolution

therefore being to regulate administratively employment terms. It was not until 1918 that the Wages Councils legislation could be properly categorised as auxiliary legislation when it became possible to establish a new Council without showing that wages were "exceptionally low" in that industry. The policy of "collective laissez-faire" was not yet upon us. While free play to the collective forces of society was now permitted the law would not intervene to promote a more equitable equilibrium in the power balance. Terms and conditions of employment were to be settled by the combined forces of capital and labour meeting in the market place.

Once the 1906 Act was placed on the statute book it was going to be very difficult to control effectually trade unionism by law. A tradition was being allowed to develop whereby trade unions could pursue their activities unrestrained by the law. Again as time went on more unions became stronger and the prospect of legal regulation would be less likely to be viewed by them as bringing sufficient advantages to outweigh the disadvantages. Even before 1906 the efficacy of legal constraints would have depended on the co-operation of trade union hierarchies. It has always been difficult to envisage any type of sanction which could restrain a body of employees from striking. The only practical avenue of approach is for the State to try and utilise the disciplinary powers of trade unions. This, in turn, is unlikely to be successful in the absence of consensus as to the use of the law. To impose legal restraints on unco-operative trade unions might raise the level of conflict in two ways. First, the active opposition of trade unions could lead to greater social conflict

(for example, in response to a damages award being made against them). Second, if trade union organisation is weakened by litigation, collective bargaining, a mechanism which institutionalises conflict, will become less effectual.

# CHAPTER 1: THE DEVELOPMENT OF LABOUR LAW - 1867-1906

## FOOTNOTES

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- 5 B Bercusson, Fair Wages Resolutions, p 107.
- 5 P S Atiyah, The Rise and Fall of Freedom of Contract, (Oxford 1979) pp 408-409.
- 6 See the discussion in J D Heydon, The Restraint of Trade Doctrine (London 1971) pp 29-30.
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- 8 See, for example, Atiyah, op cit, pp 411-412.
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- 33 On 'New Unionism', see Clegg, Fox and Allen, op cit, Ch 2.
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- 35 Royal Commission on Labour.
- 36 Ibid at para 90.
- 37 Royal Commission on Labour, op cit, para 92.
- 38 Royal Commission on Labour, op cit, para 112.
- 39 Royal Commission on labour, op cit, para 130.
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- 63 Ibid.
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- 95 Bealey & Pelling, Labour and Politics, 1900-1906, pp 74-76.
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## CHAPTER 2

### THE LAW AFTER 1871

The most fundamental barrier to suing a trade union was a union's lack of legal personality. Anyone wishing to sue a union would have been required to name all the members in the action. The union funds were the property of the membership and '... judgment could not be recovered against any person or persons not named as defendants in the action.'<sup>1</sup> So where '... an association consisted of so large a number of persons that it was impracticable to ascertain the names of all of them or to make them all defendants, the property of the association as distinguished from that of the individual members, could not be taken in execution in a common law action'.<sup>2</sup> It being widely assumed, prior to the decision of the House of Lords in Taff Vale Railway Company v ASRS, that a trade union could not be sued in its own name.<sup>3</sup> The Court of Appeal<sup>4</sup> shared this assumption and had held that '... in substance ... a trade union, though not an unlawful association, is not a corporation nor a partnership, and, as seems to follow, that for wrongful acts done by the union the funds of the society cannot in any way be made responsible'.<sup>5</sup> The House of Lords viewed the matter differently holding that a registered trade union could be sued in its registered name.

The Juridical Review commented that trade unions 'Hitherto ... have acted on the assumption that they might commit through their agents the most lawless acts and yet enjoy complete immunity so far as their funds are concerned'.<sup>6</sup>

### Representative Actions After 1875

As a result of procedural changes in 1875 it might have been thought possible to sue a trade union in a representative action. An unsuccessful attempt to do so was made in the tort case of Temperton v Russell in 1893.<sup>7</sup> The reason for the failure of the action was the Court of Appeal's interpretation of the new procedure; this interpretation was subsequently rejected by the House of Lords in 1901 in Bedford v Ellis.<sup>8</sup> Bedford preceded Taff Vale Railway Company which contained dicta to the effect that a trade union could be sued by means of a representative action.

It must be considered whether a representative action could have been brought over a collective agreement prior to Taff Vale. After 1893 Temperton v Russell would have served as a source of discouragement to such actions, at least until Bedford v Ellis. Admittedly a narrow explanation for the decision in Temperton might be that the defendants named were not genuinely representative. However, this is difficult to reconcile with the judgment of the court. In any event it might have been argued that the effect of Temperton was confined to actions in tort.<sup>9</sup> Given the subsequent rejection of the reasoning in Temperton by the House of Lords it might be thought that a successful use could have been made of the representative action against a trade union prior to 1893. The use of the representative action was always surrounded by a number of severe technical impediments.<sup>10</sup> It appears that it would have been unlikely that an action for damages for breach of contract would have been permitted.<sup>11</sup> Subsequently it emerged that the fact of a changing membership might exclude the possibility of an action in contract.<sup>12</sup> However, Temperton aside no attempt seems

to have been made to sue a trade union by using a representative action and one may ask why this should be so. It is surely significant that the 1870s and 1880s were very much litigation free - in contrast to the 'litigation happy' 1890s. '... the period which followed ... [the Acts of 1871-6] ... was one of trade union weakness marked by a series of major defeats in the industrial field. Employers therefore had little incentive either to seek help from the courts or to agitate for the revision of the Acts'.<sup>13</sup>

#### The Ambit of s 9 of the 1871 Act

Prior to the Taff Vale, if one discounts the possibility of a representative action, the only way to sue a trade union would be to sue the trustees. S 9 of the 1871 Act empowered the trustees of any registered trade union to defend any action '... touching or concerning the property, right, or claim to property of the trade union ...'. The ambit of the section is harder to ascertain: '... are the legal proceedings contemplated by the section limited to actions which concern specific property or does any claim which threatens the general assets of the union fall within its scope?... Within the narrow construction are claims arising out of particular property, such as a breach of covenant in respect of land vested in the trustees. Within the wide construction fall claims arising out of the activities of the union, but not incidental to the ownership of particular property, as, for example, a claim for damages for wrongful dismissal by an employee'.<sup>14</sup> Dicta in a case prior to the House of Lords decision in Taff Vale had lent support to the wider construction. In Linaker v Pilcher Mr Justice Mathews had stated that '... an action for a breach of contract entered into on behalf of the society would be an action touching

their property: and likewise an action for damages for tort would be an action touching the property of the society'.<sup>15</sup> This leads one to query whether an action for breach of a collective agreement could have been brought under s 9.

That the case of *Linaker* was the cause of some concern to the supporters of labour is evident from the parliamentary debates on the 1906 Act. The view being expressed that a wide construction of s 9 could nullify the effect of s 4.<sup>16</sup> While the government described such fears as being '... purely imaginary',<sup>17</sup> they led to the modification of s 4(2). As a result it was expressly provided that the trustees could not be sued in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute. Subsequent to the 1906 Act there are dicta going either way as to the proper construction of s.9 and, therefore, the position in respect of a collective agreement remains a moot point.<sup>18</sup>

#### The Representative Action in Scotland

The procedural obstacles which existed in England as to the suing of voluntary associations by the means of a representative action do not appear to have posed a problem in Scotland. Cases from 1862 onwards allow an unincorporated body to be sued in its own name '... provided its responsible officers and managers are also called in their representative capacity'.<sup>19</sup>

#### The Taff Vale Case

Two lines of thought can be found in the decision of the House of Lords.<sup>20</sup> The majority view treated a registered trade union as a



quasi corporation. This was established by deducing the intention of the legislature in enacting the 1871 Act. In the words of Farwell J, whose judgment was adopted by the Lord Chancellor and Lord Brampton. 'The proper rule of construction of statutes such as these is that in the absence of express contrary intention the Legislature intends that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. It would require very clear and express words of enactment to induce me to hold that the Legislature had in fact legalised the existence of such irresponsible bodies with such wide capacity for evil.'<sup>21</sup>

Farwell J acknowledged that by registering a trade union did not become incorporated. On the other hand, he found it significant that registration resulted in the granting of two of the essential qualities of a corporation - the capacity to own property and the capacity to act by agents. The minority view, which is to be found in the judgments of Lords MacNaghten and Lindley, is that while one can sue a union in its registered name the action is a representative one.<sup>22</sup> It must be said that discerning the ratio of the two minority judgments is somewhat problematic. Nevertheless Lord MacNaghten remarks that 'The registered name is nothing more than a collective name for all the members'<sup>23</sup> and Lord Lindley states that 'The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes ... it is only a more convenient mode of proceeding than that which have to

be adopted if the name could not be used'.<sup>24</sup> Several years later Lord Lindley was to remark, in a similar vein, that 'A trade union is, and its name is only a convenient designation for, an unincorporated society of individuals ...'.<sup>25</sup> The minority view creates more difficulties than it solves. In the main this is because no explanation is given of how, if by suing a union in its registered name one is essentially bringing a representative action, the numerous and significant technical difficulties of bringing a representative action are overcome.

In the light of the majority view in Taff Vale it seemed clear that a registered union could sue and be sued in respect of contracts entered into by it.<sup>26</sup> While none of the judgments specifically deal with this issue their wording is so wide as to suggest that this must be so. In the words of Lord Shand '... the power of suing and liability to be sued in the society's name is clearly and necessarily implied by the provisions of the statutes'.<sup>27</sup>

Farwell J assumed that the obstacle in the way of any contractual action was s 4.<sup>28</sup>

#### Trade Unions Lawful At Common Law and the 1871 Act

It has been argued that where a trade union, which is a lawful association at common law, is sued in its registered name s.4 will apply.<sup>29</sup> S 4 commences with the words 'Nothing in this Act shall enable any court' and since the provisions as to registration are contained in the Act then arguably the Act is enabling an action in the registered name to be brought. This appears to have been the view of Lord Atkinson in Russell.<sup>30</sup> Having noted that the Taff Vale case was based on construing the 1871 Act he continued: 'the

conclusion which... must necessarily be drawn from those judgments is this: that if the Act of 1871 had contained a provision to the effect that nothing in it should enable any Court to entertain any legal proceedings founded upon any tort committed by a trade union through its agents, the decision... in the Taff Vale case would have been precisely the opposite of what it was ... But the provisions of s 4, as regards the present action, are in effect similar to the hypothetical provisions above mentioned in their relations to such torts. All the reasoning based upon those provisions of the Act of 1871 upon which the judgments in the Taff Vale case were founded is therefore inapplicable to this action.<sup>31</sup>

On the other hand, it might be argued that reliance on the 1871 Act is unnecessary where the trade union is lawful at common law. The Act does not enable an action to be brought but merely allows an action to be brought in the registered name rather than by way of a representative action.

#### Restraint of Trade

The existence of the doctrine of restraint of trade meant that most trade unions would be unlawful at common law. It is a widely held view that, as a result, trade unions were unable to enforce any contract entered into. On the other hand, it has been argued that while a trade union in restraint of trade could not enforce the union rules at common law it may well be able to enforce a contracts with third parties which were otherwise lawful. Thus Selwyn goes on to argue that the '... courts would only refuse to enforce a collective agreement if it was discovered that the actual agreement itself was in restraint of trade. The extent to which

this is so would have to be determined in each case, but prima facie this would not appear to be generally the case'.<sup>34</sup> The latter view would appear to be very much a minority one. Perhaps more importantly the minority view appears to have been slow to emerge. So in all probability contracts entered into by unions would be unenforceable but for the relief given by s.3 of the Trade Union Act 1871. However, not every trade union was unlawful at common law.<sup>35</sup> By the beginning of the 20th century judicial notions of what constituted a restraint of trade were becoming rather fluid. However, the 1912 decision of the House of Lords in Russell v Amalgamated Society of Carpenters and Joiners <sup>36</sup> demonstrated that any relaxation of the operation of the doctrine was unlikely to be fully extended to trade unions. While most of the rules of the Society survived judicial scrutiny, a number did not. It is not every rule which restrains trade which is invalid but only rules which are unreasonable. In the eyes of Lord Shaw of Dunfermline Rule 9(5) which provided for a levy 'In the event of any great struggle between capital and labour in our own or any other trade ...' involved an improper restraint of trade. Lord Shaw stated that 'so far as the individual liberty of the worker is concerned, it is accordingly fairly plain that trade in respect of him is restrained, but that would not be sufficient to satisfy the conditions of unlawfulness unless these were also such as to effect trade in general or the public at large.'<sup>37</sup> Lord Robson focused his attention on Rule 48 which dealt with the disciplinary measures of fine, suspension and expulsion. These measures could be directed at, inter alia, failure to comply '... with the decision of the Executive Committee as to strikes and to obey the recognised trade union rules of the district, whatever they may be, as to the

conditions of his work'.<sup>38</sup> There was also a suggestion in Lord Shaw's speech that rules which furthered the closed shop would be seen as being in restraint of trade.<sup>39</sup> A view expressed much more robustly by Lord Justice Vaughan Williams in the Court of Appeal.<sup>40</sup>

After Russell it appeared that certain sorts of trade union rules would be likely to fall foul of the restraint of trade doctrine, in particular, certain types of rules on strikes, the furtherance of the closed shop and rules affecting other trades or industries.<sup>41</sup> Not every rule on strikes was struck at. Thus in *Osbourne* the rules of the union were found not to be in restraint of trade and the union was held to be a lawful association at common law.<sup>42</sup> Rule 13 authorised the executive committee to sanction strikes but not to order them. There was no specific provision in the rule book dealing with members who did not go on strike but rule 9(14) provided for expulsion should 'Any member ... [be] ... found guilty of attempting to injure the society ...'.<sup>43</sup> The Master of the Rolls (Cozens Hardy) stating 'I am not prepared to hold that a member who declines to join with the majority of his fellow workmen in signing and handing in notices can be said to be "guilty" of attempting to injury the society. Illegality must not be presumed or inferred. It must be established, if at all, upon some plain provision in the rules ... I can find no such provision in the rules of this society.'<sup>44</sup> Had the position been that the union could have ordered its members to go on strike the union would have been an unlawful association.<sup>45</sup> Kahn-Freund was later to comment that 'the ground is shifted from the general nature of the society's activities to a minute examination of the degree to which the union attempts to control the action of its own members'.<sup>46</sup>

Despite the changes in the law of restraint of trade it was clear that most unions would still be unlawful at common law. This was, of course, a position welcomed by trade unions as they could then invoke the restrictions imposed by s 4 of the 1871 Act. Given that the 1871 Act remained in force until the passage of the 1971 Act one must consider whether there was every any significant change in the legal position. Two 1960s Scottish cases<sup>47</sup> which concerned s 4 of the 1871 Act treated the unions involved as being unlawful associations at common law. In reaching this conclusion in *McGahie* Lord Fraser was particularly influenced by a rule which gave '... power to the executive committee to call upon all members of the union to withdraw their labour, and provides that if any member refuses to obey he shall forthwith be expelled from the union'.<sup>48</sup> Given that trade union rule books commonly contain power to order a strike and disciplinary powers which can deal with recalcitrant members it would seem likely that most trade unions would still be regarded as unlawful associations.

Finally, one must take into account judicial discretion in the granting of remedies. The granting of injunctions and interim interdicts is discretionary; though the issuance of a permanent interdict may be more a matter of right.<sup>49</sup> The question then arises as to how this discretion might be exercised in cases where s 4 is relevant. In *Russell* Lord Robson remarked that but for the enactment of s 4 the courts would "have been compelled to give full effect by decree, or injunction, to contracts whereby workmen had bound themselves not to undertake certain legitimate kinds of work, and to refrain, under certain circumstances, from working at their trade at all, except by leave of their union, no matter what their



immediate necessities might be".<sup>50</sup> Thus it may be that the restrictions imposed by s 4 were viewed as being directed in particular at restrictions concerned with conditions of employment. If that were the case there might often be a reluctance to issue injunctions/interdicts in cases involving collective agreements. On the other hand, given the range of matters to be found in collective agreements it might be thought foolish to generalise.

Mention might also be made of two famous Labour Law cases: Reynolds v Shipping Federation<sup>51</sup> and Crofter Hand Woven Harris Tweed Co Ltd v Veitch.<sup>52</sup> These decisions demonstrate that the courts adopted a much more accommodating attitude to the interests of Labour in the post first world war period. Kahn-Freund claimed that the Crofter case showed '... the acceptance by the courts of the principle of non-intervention in industrial disputes'.<sup>53</sup> While both cases clearly showed judicial understanding of collective interests how far a judicial policy of non-intervention existed is problematic. If say a collective agreement between an employer and union, had come to the courts would the courts have declined to enforce it? In the absence of the Kahn-Freund theory would the courts have made use of the concept of no intention to enter legal relations?

#### The Trade Union Act 1871 - s 4

Section 4 stated that: Nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:





...(4) Any agreement made between one trade union and another.

In the case of an agreement between an employer's association<sup>54</sup> and a trade union s.4 would appear to be a bar to direct enforcement or the recovery of damages in the event of breach. In a famous article Kahn-Freund argued "... all that s 4 does is to prevent "direct" enforcement and recovery of damages for breach. It does not strike at the validity of the contract. Does it prevent an action for a declaration as to the contents of the agreement? Does it prevent an action for an injunction?... This is not the place to answer these questions, but they are, to say the least, arguable, and this shows that, after all, the collective agreement cannot be the legal "nothing" which it is sometimes considered to be".<sup>55</sup> In fact, s 4 did not operate to comprehensively exclude the issue of a declarator.<sup>56</sup> In Re Durham Miners' Association a declaration was granted as to whether the rules authorised the payment of strike pay.<sup>57</sup> In ASCJ v Braithwaite Lord Buckmaster stated: "To construe a rule is not directly to enforce any agreement between the members, and I am unable to see any reason why the words of the statute should be so extended as to exclude a trade union itself or any of its members from obtaining the advantage of having obscure words construed by a wholly independent and impartial tribunal."<sup>58</sup> More interestingly, there are a number of cases where injunctions were granted in relation to agreements coming within the terms of s 4.<sup>59</sup> So in Yorkshire Miners' Association v Howden<sup>60</sup> a court order was made restraining the union from paying strike pay in cases not authorised by the rules. The union had argued that "The plaintiff is really seeking to enforce the agreement, which the Act says the court must not do. It can never have been the intention of the legislature to enable persons

to do negatively what they may not do affirmatively."<sup>61</sup> This line of argument resulted in Lords Davey and James dissenting, Lord Davey commenting that "... the object of this action is to enforce ... the negative stipulation, and that is in fact and in truth for specific performance of the agreement".<sup>62</sup> While this view is certainly not without its merits the arguments to the contrary prevailed. The issue of declaratory relief can be justified on the basis that no enforcement is involved; the issue of an injunction turns on what the Act meant by "direct" enforcement.

Clearly a claim for payment of debt<sup>63</sup> or the pursuit of an order for specific implement would be an attempt at direct enforcement. In Howden Lord MacNaghten was in favour of the granting of the injunction since "The object of the litigation was simply to prevent misapplication of the funds of the union, not to administer those funds, or to apply them for the purpose of providing benefits to members".<sup>64</sup> It might be mooted that while the action may not have been enforcing application of the funds it was surely enforcing the agreement. "The object of the action was to enforce the agreement, and the means sought were direct in substance though negative in form."<sup>65</sup>

While Lord MacNaghten may have been in the majority the wording of his judgment is not free from ambiguity. He is reported as saying "What is the meaning of the expression "directly enforcing"?" I cannot think that the legislature intended to strike at proceedings for directly enforcing certain agreements, leaving untouched and unaffected all proceedings (other than actions for damages) designed to enforce those particular agreements indirectly. ...I

venture to think that the word "directly" is only put into give point to the antithesis between proceedings to enforce agreements directly and proceedings to recover damages for breach of contract, which tend, though indirectly, to give force and strength to the agreement for breach of which an action may be brought."<sup>66</sup> The reasoning behind this statement would appear to be at odds with the decision in Howden itself. The statement was later discussed in the Scottish case of Smith v Scottish Typographical Association where the First Division of the Court of Session refused to grant an interdict against a trade union enforcing a resolution which was alleged to be ultra vires expelling a member.<sup>67</sup> Lord Mackenzie stated that "No more direct method of enforcing the pursuer's view of the agreement between him and the union concerning the conditions upon which he was employed could have been adopted".<sup>68</sup> His Lordship purported to follow Lord MacNaghten in Howden, stating that the latter "... no doubt puts the wider instead of the narrower construction on the words "directly enforcing" and reads them as contrasted with an action of damages, and therefore equivalent to enforcing implement."<sup>69</sup>

Moreover, the Lord President stated that "... the case of Chamberlain's Warf Limited is directly in point. I observe that the decision was referred to with approval by the House of Lords in ... Howden ..."<sup>70</sup> This is quite astonishing. Of the three judges in the majority in Howden to deliver judgments Lord Lindley felt able to distinguish Chamberlain, the Earl of Halsbury and Lord MacNaghten did not mention it. Furthermore, while the majority in Howden may have been circumspect in any critique of Chamberlain they were much more forthcoming in their distaste for Rigby v

Connol.<sup>71</sup> Rigby was a case where the Court of Appeal refused to grant a declaration and injunction to prevent a trade union member being expelled from the union on the basis that to do so would be to directly enforce the agreement. The remedy sought in Rigby was the same as in Chamberlain<sup>72</sup> and Smith and the criticism voiced in Howden might be felt to apply to all three.

A number of objections might be raised as to this 'wider' interpretation. In the first place there must be a presumption against treating the word "directly" as virtually superfluous. Secondly, if the legislature had intended a blanket prohibition against enforcement of s 4-type agreements why enumerate a specific indirect means of enforcement, ie, recovery of damages for breach?

In any event, a subsequent House of Lords decision was to give "directly enforcing" a "narrower" construction. In Amalgamated Society of Carpenters etc v Braithwaite Lord Atkinson stated that "I do not think Lord MacNaghten, in the statement made in his judgment in Yorkshire Miners' Association v Howden, ever meant to suggest that the word "directly" was to have no force given to it, or that the words "directly enforcing" include any kind of indirect enforcement of a contract other than a suit to recover damages for the breach of it."<sup>73</sup> In that case the Court granted an injunction to restrain the threatened expulsion of two trade union members. Admittedly, some commentators have regarded Braithwaite as being a case which concerns an agreement of a union which falls outwith the remit of the Section. "... there is nothing in the Acts to effect the enforcement by any proceedings of any agreement or any part of an agreement which is not of a type mentioned in the Section."<sup>74</sup>

It is submitted that while the statement quoted in the preceding sentence is correct it does not offer an explanation for the decision in Braithwaite. It seems clear from a reading of the judgments that the decision turned on what amounted to direct enforcement. (The same explanation is sometimes offered for Osbourne, but again I would reject it for the reasons mentioned.)<sup>75</sup>

The interesting question which arises is, could an interdict have been granted to restrain a breach of a collective agreement between a trade union and an employers association? What if a trade union proposed to call a strike in breach of a term of a collective agreement which stipulated that four weeks' notice had to be given to withdraw from that agreement? Could an interdict be granted? In Braithwaite Lord Wrenbury had stated that "But there is nothing in the Act to preclude the jurisdiction of the Court to uphold the integrity of the contract - to maintain unimpaired the contract as it stand - notwithstanding that it cannot enforce the contract as so maintained ... it is not enforcing an agreement against a party to grant an injunction to restrain him from tearing it up."<sup>76</sup>

A number of doubts must be raised. First, much of the litigation under s 4 was concerned with agreements for the application of the funds of a trade union for the purposes listed in s 4(3). Cases concerning agreements made between one trade union and another are harder to find. In McLuskey v Cole<sup>77</sup> one trade union, a member of another, sought an injunction to restrain its expulsion. The application was unsuccessful, Lord Sterndale MR declaring "I cannot see a much more direct way of enforcing an agreement than by an injunction to prevent a person from breaking it ...".<sup>78</sup> McLuskey

is an odd decision, and would appear inconsistent with the four cases which were cited to the Court though none of the judgments in McLuskey contain any discussion of, or even reference to, any other cases. McLuskey would also appear to be contrary to the subsequent House of Lords decision in Braithwaite. Ultimately, McLuskey illustrates the difficulty of reconciling the cases in this area of law and hence the uncertainty as to legal remedy.

The second doubt is prompted by the fact that a number of the Scottish cases demonstrate a more abstentionist approach in cases arising after Howden than that adopted by the English courts. Smith v Scottish Typographical Association<sup>79</sup> (already discussed) was subsequently followed by G & J Rae Ltd v Plate Glass Merchants' Association.<sup>80</sup> There an interdict was sought against the enforcement of a fine. The interdict was refused and Lord Dundas remarked that "I do not think it makes any difference that this petition is laid in a negative form - to interdict the defenders from putting into force the fine complained of - and not in the form of a demand for payment of the fine. In substance it seems to me to be, none the less, a legal proceeding instituted with the object of enforcing an agreement for payment of a penalty to a trade union."<sup>81</sup> Both of these purport to follow the English Court of Appeal decision in Chamberlain's Wharf Ltd v Smith<sup>82</sup> a decision which is very difficult to reconcile with the ratio of Howden.<sup>83</sup> The Scottish courts, therefore, may have been somewhat less interventionist than their English counter-parts. It should be noted that "The earlier decisions ... (ie, Chamberlain's Wharf and Rigby) ... were reviewed in the case of Braithwaite. It was there decided that the wider view expressed in Rigby v Connol was unsound and could not stand with the judgment in Howden's case".<sup>83a</sup>



The third doubt, and arguably the most significant, flows from a comment made by Lord Buckmaster in Braithwaite: "I have not referred to the case of Wolfe v Matthews for that depends upon considering whether relief by way of injunction is a method of directly enforcing an agreement, and that question does not admit of a complete and comprehensive reply. It depends upon the circumstances but ... an injunction as is here sought is not a direct enforcement of any of the forbidden provisions".<sup>84</sup> A number of other dicta suggest that some courts may have looked to the object of the action and asked whether granting relief would amount to direct enforcement.<sup>85</sup> In what circumstances would an injunction be a direct enforcement of a collective agreement? A collective agreement may well contain clauses prohibiting one of the parties to it from carrying out certain actions, eg, an employer shall not employ non-union labour. If an employer proposed to breach this clause the appropriate remedy to enforce it would arguably be an interdict and therefore could not be granted, being a direct enforcement. The clause being negative in form, a negative remedy must provide the means of enforcement. What, though, if the clause had stipulated that an employer must employ union-only labour and an employer proposed to breach this by hiring "free" labour? Would the object of seeking an interdict be to directly enforce the agreement? Arguably, to grant an interdict would not be tantamount to direct enforcement of the agreement since you are not compelling performance (you are not compelling him to employ anyone). If the above is correct this would mean that the availability of a remedy could depend on such semantic differences between agreements. Such a result might well have been thought to be inevitable once the artificial divide between



direct and indirect enforcement had been established.

So long as a collective agreement was not between a trade union and an employers' association s 4 did not present an obstacle to enforcement. What was the position then? Gloag on Contract states that 'The effect of a contract between a trade union and a third party is but slightly illustrated by decisions. But as the Trade Union Act 1871, removes the taint of illegality arising from the objects of the union being in restraint of trade, it is clear that there can be now no general objection to the enforcement of such contracts.'<sup>86</sup> What of the concept of 'intention to enter legal relations'? In Scotland it may well be that, even today, let alone in earlier times the concept is not known to Scots law. In 1977 a consultative memorandum issued by the Scottish Law Commission declared that '... if in Scotland the courts decline to enforce, or to award damages for breach of an agreement on a purely social or domestic or internal family matter, the basis upon which they do so is not stated to be the parties lack of contractual intention, but rather that such agreements are "personal".... and so the courts, in the absence of a patrimonial interest on the part of the pursuer, will not afford a legal remedy for breach'.<sup>87</sup>

In England the concept flows from the 1917 Court of Appeal decision in Balfour v Balfour. Undoubtedly it was then confined to social and domestic arrangements. Moreover, even within those spheres the concept was highly controversial.

CONCLUSIONS

Once a trade union could be sued in its registered name the potential for litigation was obviously greater. S 4 of the 1871 Act was not an insuperable barrier to litigation over collective agreements. For the litigious there were clearly a number of potential entry-points. Again s 4 only applied to agreements between employers associations and trade unions. At the end of the day there remained an absence of case law.

## CHAPTER 2: THE LAW AFTER 1871

## FOOTNOTES

- 1 Report of the Royal Commission on Trade Disputes and Trade Combinations, Cd 2825 (1906), p 4, para 16.
- 2 *ibid.*
- 3 [1901] AC 426.
- 4 [1901] 1 QB 170.
- 5 1901 LQR Vol 17, 122.
- 6 [1901] JR Vol 13, 365 at 366.
- 7 [1893] 1 QB 435.
- 8 [1901] AC 1.
- 9 Wood v McCarthy [1893] 1 QB 775 at 778.
- 10 Eg see the unsuccessful attempt to use the Procedure in Walker v Sur [1914] 2 KB 930.
- 11 Lloyd, Actions Instituted By Or Against Unincorporated Bodies, 1949 MLR Vol 12, 409 at 414.
- 12 Barker v Allanson [1937] 1 KB 463. Cf Ideal Films Ltd v Richards [1927] 1 KB 374.
- 13 Clegg et al, A History of British Trade Unions since 1889, Vol 1, p 305.
- 14 H Vester and A H Gardner, Trade Union Law and Practice (1958) p 162.
- 15 Linaker v Pilcher (1901) 70 LJ KB 396.
- 16 Vol 162, Col 1775.
- 17 Vol 162, Col 1778.
- 18 Vester and Gardner, *op cit*, pp 162-163.
- 19 Bridge v South Portland Street Synagogue 1907 SC 1351, 1352. See also Agnew v Addison 1892-3 20 R (H) 19.
- 20 [1901] AC 426.
- 21 *ibid* at 430-431.
- 22 In Bonsor v Musicians' Union [1956] AC 104, 125 Lord Morton stated that this view '... has never been more than a minority view, inconsistent with the relevant authorities from the Taff Vale case onwards, with the solitary exception of Kelly's case'.

- 23 Taff Vale Railway op cit, 439-440.
- 24 Taff Vale Railway op cit, 445.
- 25 Yorkshire Miners' Association v Howden [1905] AC 256 at 280.
- 26 See eg Amalgamated Society of Carpenters, Cabinet Makers and Joiners v Braithwaite [1922] 2 AC 440.
- 27 Taff Vale Railway Company op cit, 441.
- 28 Taff Vale Railway op cit, 429.
- 29 K W Wedderburn, The Worker and the Law (1st edn, 1965) p 310.  
K W Wedderburn 1957 Vol 20 MLR 105, 121.
- 30 Russell v Amalgamated Society of Carpenters and Joiners [1912] AC 421.
- 31 Ibid at 430-1.
- 34 N Selwyn, Legal Aspects of Collective Agreements, p 202.
- 35 Gozney v Bristol Trade & Provident Society [1909] 1 KB 901.
- 36 [1912] AC 421.
- 37 Ibid at 435.
- 38 [1912] AC 421.
- 39 [1912] AC 421, 436.
- 40 Russell v Amalgamated Society of Carpenters and Joiners [1910] 1 KB 506, 516-518.
- 41 M A Hickling, Citrine's Trade Union Law (3rd edn) (1967) Ch 2.
- 42 [1911] 1 Ch 540.
- 43 Ibid at 543.
- 44 [1911] 1 Ch 540, 552-553.
- 45 Russell v Amalgamated Society of Carpenters and Joiners [1910] 1 KB 506 (at 518 Vaughan Williams LJ) (at 523 per Farwell LJ).
- 46 O Kahn-Freund, The Illegality of a Trade Union, 1944 MLR 192 at 201.
- 47 Briggs v NUM 1969 SLT 165. McGahie v USDAW 1966 SLT 74.
- 48 McGahie v USDAW 1966 SLT 74 at 75.
- 49 Burn-Murdoch on Interdict (1933), Ch 1.

- 50 [1912] AC 421 at 441.
- 51 [1924] 1 Ch 28.
- 52 [1942] AC 435.
- 53 O Kahn-Freund, 'Labour Law' in *Selected Writings*, p 23.
- 54 It should be noted that not every employer's association would have been a trade union within the meaning of the legislation. See N Selwyn, *op cit*, p 173.
- 55 O Kahn-Freund, *op cit*, 1942-43 MLR 112 at 114.
- 56 H Vestor & A H Gardner, Trade Union Law and Practice (1958) pp 142-143.
- 57 (1900) 17 TLR 39.
- 58 Amalgamated Society of Carpenters, Cabinet Makers and Joiners v Braithwaite [1922] 2 AC 440-451. See also Osborne v Amalgamated Society of Railway Servants [1911] 1 Ch 540, 560.
- 59 See note 56 above.
- 60 [1905] AC 256.
- 61 *Ibid* at 258.
- 62 [1905] AC 256 at 269.
- 63 Wolfe v Matthews (1882) 21 Ch D 194. Cf Evans and Co v Heathcote [1918] 1 KB 418.
- 64 [1905] AC 256 at 265.
- 65 [1905] AC 256 at 258.
- 66 [1905] AC 256 at 264.
- 67 1919 SC 43.
- 68 *Ibid* at 54.
- 69 1919 SC 43 at 55.
- 70 1919 SC 43 at 52.
- 71 (1880) 14 Ch D 482 see also the judgment of Lord Buckmaster in Amalgamated Society of Carpenters v Braithwaite [1922] 2 AC 440 at 449.
- 72 Chamberlain's Wharf Ltd v Smith [1900] 2 Ch 605.
- 73 [1922] 2 AC 440, 455.

- 74 H Vester and A H Gardner, Trade Union Law and Practice, p 143.
- 75 Osbourne op cit, with the possible exception of Lord Justice Buckley at 569/570.
- 76 [1922] 2 AC 440 at 469.
- 77 [1922] 1 Ch 7.
- 78 Ibid at 13.
- 79 1919 SC 43 see also Drennan v Associated Ironmoulders of Scotland 1921 SC 151.
- 80 1919 SC 426.
- 81 Ibid at 430.
- 82 [1900] 2 Ch 65.
- 83 [1905] AC 256. And see the comments on Chamberlain's Wharf by Lord Buckmaster in Braithwaite [1922] 2 AC 440, 451.
- 83a Encyclopaedia of the Laws of Scotland, Vol 14, para 1248.
- 84 [1922] 2 AC 440.
- 85 One example possibly being the judgment of Lord Justice Fletcher-Moulton in Osbourne op cit at 559: "Will the effect ... [of issuing an injunction] ... be to enforce an agreement for the application of the funds of the trade union to provide benefits for him?"
- 86 W Gloag, Law of Contract, (2nd edn), p 122.
- 87 SLC Memo No 36, Constitution and Proof of Voluntary Obligations, p 86.

### CHAPTER 3

#### LEGAL DEVELOPMENTS, 1906-1939

##### PART ONE: 1906-1914

The greater extent of government involvement in industrial relations in the early years of the twentieth century is striking. While legal enactments were limited in number the state was able to compel the end it desired in other ways. In 1907 the government acted to end a national strike which had broken out on the railways. A settlement was achieved by making it clear to the employers that rejection of the mooted compromise would result in the introduction of a statute '... making arbitration in railway disputes compulsory in all cases where the Board of Trade considers ... the dispute warrants such a course being adopted.'<sup>1</sup> Securing a particular result by threatening to enact a more drastic solution is, in substance, little different to enacting the more moderate solution. Accordingly for anyone interested in assessing whether Britain's Labour Law system is 'voluntarist' such interventions must also be taken into account.<sup>2</sup> Subsequent events on the North Eastern railway in 1913 furnish a further example of this sort of process. A recognition dispute existed with that company which was resolved by the employees getting '... Labour members to block a private bill promoted by the North Eastern, at the end of 5 weeks it gave way ... [and] ... recognised the union ...'.<sup>3</sup> Again, the implementation of the Whitley Report was given a boost by government making '... the free use of the threat of the possible establishment of a trade board if a Council was not set up'.<sup>4</sup>



Trade union recognition was also furthered by government contracts requiring it.<sup>5</sup> Government influence did not always create an impact in such a dramatic fashion. Measures taken during war time, for example, were to effect British industrial relations in the much longer term. Flanders has written that '[T]he change of enduring importance which resulted from such intervention and other war-time conditions was the shift from local to national bargaining. After the war, national, centralised negotiations between the headquarters of trade unions and employers' associations, or between federations of these bodies, became the predominant form of collective bargaining'.<sup>6</sup>

It is interesting to recall the work of the Board of Trade which generally worked through non legal mechanisms. Those mechanisms being utilised to promote union recognition and collective bargaining.<sup>7</sup> Again 'while the Board never imposed any formal wages policy upon its umpires, the type of arbitrator selected invariably conditioned the criteria adopted in the determination of wages awards'.<sup>8</sup> These criteria were generally unsympathetic to the interests of labour. The Trade Boards legislation and the reform of the Fair Wages Resolution must be assessed as part of any analysis of the State's stance towards industrial relations. In 1909 the Trades Board Act was passed which provided minimum wage legislation for the 'sweated' trades. Minimum Wage law was subsequently to be regarded as a prop to collective bargaining but one must consider how it would have been viewed in 1909. It is far from easy to identify the motives which lead to the enactment of any statute. However, perusal of a number of government reports,<sup>9</sup> bills<sup>10</sup> and the parliamentary debates suggest mixed

motives. It is submitted that the predominant motive was simply to set a basic standard: '... it is quite as legitimate to establish by legislation a minimum standard of remuneration as it is to establish such a standard of sanitation ... and hours of work ...'.<sup>11</sup>

A secondary motive flowed from the view that such legislation would promote the growth of collective bargaining. It is important to appreciate that not all supporters of the legislation espoused this belief. The 1908 committee on home-work seem to have believed that workers in the sweated trades would have to look to the law and not to the development of trade union organisation for protection.<sup>12</sup> Aves in his 1908 report on the Wages Boards and Industrial Conciliation and Arbitration Acts of Australia and New Zealand obviously found the issue a very difficult one.

"In general the ultimate effect upon Trade Unionism of the assumption of official responsibility for matters which under a voluntary system would in organised trades be left to the trade union itself, must be to weaken these bodies, since it weakens the motives for their formation and development. At the moment, however, the effect of the Special Boards, stimulated by a sense of what is regarded as their defects and limitations, appears to be tending to strengthen the Trade Union movement in Victoria"<sup>13</sup> On the other hand Winston Churchill, then the President of the Board of Trade believed that the legislation would foster collective organisation.<sup>14</sup>

In what way or ways might the legislation foster collective bargaining? In the sweated trades competition was severe and this

would mean that there was little value in employees seeking to collectively bargain with employers as the latter would not enter into collective agreements for fear of undercutting. Trade boards might be conducive to greater stability and the development of trade union organisation. On the other hand, it might be felt that employees would become dependent on such legislation to the detriment of any expansion of trade unionism. Secondly, the administrative set-up of the Trade Boards was possibly seen as a basis for voluntary organisation. Moreover, some anticipated '... that they may possibly by means of these Trade Boards and trade committees, be able to educate the weak and unorganised trades and encourage them after a while to combine for their own protection just as other better organised and more advanced trades have combined'.<sup>15</sup>

At the time of enactment one could not depict the legislation as other than regulatory and Kahn-Freund appeared to recognise this.<sup>16</sup> In 1909 it would most likely have been regarded as a natural extension of the Factories Act.<sup>17</sup>

What of the Fair Wages clause after the 1909 amendments? The Fair Wages Committee of 1908 which had been established by the government to review the resolution certainly saw its function as setting minimum standards and not as promoting collective bargaining. While some of the supporters of the resolution undoubtedly saw it as having a secondary role in the fostering of collective bargaining, like the Trades Boards legislation, it could not be viewed as auxiliary legislation.

The Coal Mines Regulation Act 1908 was a further example of what, at the time, must have been seen as a move towards more extensive regulatory legislation.<sup>18</sup> Phelps Brown's discussion of this is illuminating: 'The miners ... had ... won from Parliament the limitation of hours they could not wrest from the owners. It was natural to infer both that it was easier to get industry-wide regulation from the Government than improvements district by district from the employer, and that the way to get it was by the industry-wide strike.'<sup>19</sup>

1912 witnessed the passing of the Coal Mines (Minimum Wage) Act. While the Trade Boards Act of 1909 was an earlier example of legislative intervention in the fixing of wages it was confined to the sweated industries where '... the rate of wages prevailing in any branch of the trade is exceptionally low ...'.<sup>20</sup> The Act of 1912 stipulated that it was to be an implied term of every miner's contract of employment that he be paid a minimum wage fixed under the Act. Minimum wage rates were to be fixed by joint district boards for each district.<sup>21</sup> 'In point of fact, in 1912 the number of district boards constituted was not great, the majority of the boards or committees already in existence for other purposes being accepted by the Board of Trade for the purpose of the Act.'<sup>22</sup> The wage fixed could be varied at any time by agreement between the employee and employer representatives on the Board. Alternatively, either side could apply for a variation after one year; provided three months' notice had been given after the expiration of the year. Should the board fail to reach an agreement the chairman had power to settle the rate.

It is said that on the passage of the Act '... Keir Hardie jumped with joy at the result, not because he agreed with all the terms of the Bill, but because legislative enactment had recognised the minimum wage'.<sup>23</sup>

It was against this background of increasing State intervention (often through legal mechanisms) that the Industrial Council Report of Enquiry into Industrial Agreements was produced.<sup>24</sup> At this time no widely-subscribed philosophy had yet emerged as to the types of legal intervention which were salutary or as to the division between areas appropriate for legal intervention and those best left to voluntary action. The views of the Council as to law and collective agreements are therefore of interest.

The Council were impressed by the level of adhesion to collectively agreed obligations and went on to consider the circumstances that were conducive to this. Like the Royal Commission on Labour of 1894 they stressed the importance of strong organisation to successful voluntary collective bargaining: problems arising '... in trades which are unorganised or in which on one side or the other the organisation is incomplete or is of recent origin ...'.<sup>25</sup> This corresponds with the fact that the industrial militancy in the period between 1906-1914 was largely confined to low-paid and unskilled workers.<sup>26</sup>

The question was posed as to whether the law could promote adhesion to collective agreements but greater caution was displayed when it came to recommending legal intervention.<sup>27</sup> This stemmed not from an aversion to state interference in principle but from a concern

lest the sound conduct of industrial relations be impeded. For example, '... the ultimate result of the institution of a system of legal money penalties for breaches of agreement or the legal prohibition of assistance to members in breach might be that the Trade Union leaders would find themselves precluded from entering into agreements at all, or, if agreements were entered into, that they would be compelled to insist upon the insertion of a clause which enabled them to terminate the agreements upon exceedingly short notice. An alternative to this might be defiance of the law, when there would at once arise all the difficulties inherent in any attempt to enforce the law against a large number of individual workmen - with no ultimate source of pressure short of imprisonment'.<sup>28</sup> The council believing that agreements were complied with so far as could reasonably be expected, if the law were to demand more the consequences might well be unfortunate. Again there was the belief that the surest guarantee that an agreement would be kept was for it to be voluntarily entered into.

Some legal reform was favoured. The Council wished to see a process whereby the terms of a collective agreement could be extended and made obligatory on employers who were not party to the agreement but who were engaged in the same trade or district. 'Where an agreement has been so declared to be extended, it shall be an implied term of any contract of service in the particular trade or district that the terms of the agreement shall be an essential part of such contract.'<sup>29</sup> This proposal was motivated by a concern that the stability of collective bargaining arrangements might be undermined by undercutting. Extension was to be conditional upon the agreement containing two specific

clauses. First, that there should be an agreed term that there shall be no stoppage of work or alterations of the conditions of employment until the dispute has been investigated by some agreed tribunal, and a pronouncement made upon it. This fitted in with a general exhortation that all agreements should contain such a clause. Secondly, it was to be a pre-requisite of extension that at least X days notice be given by either party of an intended change affecting conditions as to wages or hours. In addition, it was recommended that consideration should be given to whether the collective agreement or the rules of the employer's association or trade union party to the agreement contained a rule forbidding financial assistance to any member taking action in breach of the 'peace obligation'. The insistence on such conditions before the 'common rule' would be made obligatory was an indirect method of seeking to promote 'model' collective agreements.

Any discussion of greater legalisation naturally leads to questions as to the amenability of collective agreements to the legal process. It was felt that '... industrial agreements cannot fairly be compared with the ordinary commercial contracts made between individuals or corporate bodies ... in the case of industrial agreements circumstances may arise subsequent to the date of the agreement which might be held to justify a right of relief from the whole or some part of the terms of the agreement'.<sup>30</sup> More interestingly, the difficulties involved in the interpretation of collective agreements were discussed. The council found that '... the form of words adopted is frequently only an approximation to the real intentions of the parties, the stress of the moment rendering it impracticable (and sometimes even



undesirable) to enter into a strict analysis of the possible literal meanings of a form of words which has been suggested by one side or the other ... so it sometimes happens that when the agreement comes to be put into practice different interpretations may be put upon some part of the document'.<sup>31</sup> It is open to question whether it would have been appropriate to leave the interpretation of such an agreement to traditional judicial proceedings. On the other hand, the Council appeared to feel that it was possible to make the distinction between conflicts of rights and conflicts of interest.

It can be seen, therefore, that the Council placed its faith in the institution of voluntary collective bargaining. Strong organisation and more sophisticated agreements (e.g. ones with improved disputes procedures) would lead to further improvements. No theory of non-intervention in the Labour Law field existed to restrain the Council, nevertheless, no practical benefits were envisaged from direct legal enforcement of collective agreements.

## PART TWO: THE IMPACT OF WAR

In 1914 British Labour Law had yet to develop to a position whereby any satisfactory rationalisation might be made. Various occurrences over the next four years were to throw further factors into the melting-pot. The First World War saw a great escalation in the level of state intervention in all aspects of British society and industrial relations was naturally affected; compulsory arbitration being introduced in 1915. In 1916 the Whitley committee was established as part of the planning for post-

war reconstruction and a number of reports were produced.

A policy committee established in such times could potentially set in motion far reaching changes. The domestic conduct of such a major war challenges many assumptions and leads to an atmosphere receptive to reform. While it is arguable that 'caution was ... made necessary by the inevitable reaction against government interference once the war was over'<sup>33</sup> it may be mooted that in such innovatory times the options open to Whitley were distinctly open.

The committee stressed the benefits that could be gained from co-operation between the two sides of industry though at least some of their number believed in an inherent conflict of interest. So despite the value in improving collective bargaining '... a complete identity of interests between capital and labour cannot be thus effected, and that such machinery cannot be expected to furnish a settlement for the more serious conflicts of interest involved in the working of an economic system primarily governed and directed by motives of private profit'.<sup>34</sup>

The committee placed its faith in the improvement and expansion of joint decision-making. The general purpose of the proposed Joint Industrial Councils was to 'secure the largest possible measure of joint action between employers and workpeople for the development of the industry as a part of the national life and for the improvement of the conditions of all engaged in that industry'.<sup>35</sup> Moreover, '... an essential condition of securing a permanent improvement in the relations between employers and employed is that there should be adequate organisation on the part of both employers

and workpeople.<sup>36</sup> Industrial self-government was a worthy aspiration and an important factor in dealing with industrial problems was being able to draw on the knowledge of capital and labour. The essence of the reports was the recommendation of improved conciliation methods, trade union recognition and extension of the scope of collective bargaining.<sup>37</sup>

If joint regulation was the desired goal how was this to be furthered? Whitley paid some attention to the question of the role of the law. Proposals for compulsory arbitration were emphatically rejected: '... there is no reason to believe that such a system is generally desired by employers and employed and, in the absence of such general acceptance, it is obvious that its imposition would lead to unrest. The experience of Compulsory Arbitration during the war has shown that it is not a successful method of avoiding strikes, and in normal times it would undoubtedly prove even less successful.'<sup>38</sup> The Committee also considered whether agreements made by the JIC's should be legally enforceable. They were opposed to any scheme which sought to compel legal enforceability but believed that consideration should be given to making the necessary legislative changes which would allow the parties to enter into legally enforceable collective agreements. Regulatory legislation was not a favoured mode of approach and this ties in with Whitley's vision of the state's place in industrial relations. "It is fundamental to the idea of a Joint Industrial Council that it is a voluntary body set up by the industry itself, acting as an independent body and entirely free from all state control."<sup>39</sup> Where industrial organisation was adequate Whitley saw no justification for external interference:

'... our proposals are that the content of state assistance should vary inversely with the degree of organisation in industries'.<sup>40</sup> Where government intervention was required its function should be to promote voluntary institutions. In effect the Committee was calling for auxiliary legislation: 'We do not ... regard Government assistance as an alternative to the organisation of employers and employed. On the contrary, we regard it as a means of furthering the growth and development of such organisation.'<sup>41</sup>

In the light of the favouring of auxiliary measures Whitley's discussion of the Trade Boards deserves attention. The committee believed that the scheme of JICs was inappropriate where unorganised and badly organised industries were concerned. In those areas it would be more profitable to set up Trade Boards until there was sufficient organisation to allow collective bargaining, the Committee stating in their second report that '... Trade Boards should be regarded ... as a means of supplying a regular machinery for negotiation and decision on certain groups of questions dealt with in other circumstances by collective bargaining between employers' organisations and trade unions'.<sup>42</sup>

Subsequently the criteria for the establishment of a new board was amended so that one could be set up where 'no adequate machinery exists for the effective regulation of wages throughout the trade, and that accordingly, having regard to the rate of wages prevailing in the trade, or any part of the trade, it is expedient that the Act should apply'.<sup>43</sup> So while the principal aim of the 1909 Act had been to secure minimum rates of wages the new legislation was, in addition, clearly intended to foster collective bargaining.

The proposer of the amending legislation, the Minister of Labour Mr G Roberts, put forward his vision of its operation:

'I would like to regard the wages boards as a temporary expedient facilitating organisation within the industry, so that, in the course of time, the workers or the employers will not have need for the statutory regulations, but that their organisation will have then developed into a JIC, whereby the affairs of the industry will be controlled and managed by the people concerned in the industry themselves, without any recourse to any legislative expedient.'<sup>44</sup>

The experience of the operation of the existing regime led to the belief that, in practice, trade boards actually encouraged organisation in the industries concerned. The 1918 Act was viewed as a part of an industrial relations structure which upheld '... the voluntary principle of negotiation... [whereby] ... employers and workers should continue to manage their own affairs'.<sup>45</sup>

In retrospect the importance of the Whitley report can be seen as existing as much in its underlying policy as in the detail of its proposals. It can be seen as marking the beginning of a period in which State policy came to be viewed, fairly consistently, as being based upon certain lines. Voluntary collective bargaining was believed to be the best way to manage industrial relations, the role of law was an auxiliary, not a regulatory, one, and compulsory arbitration was unacceptable except in exceptional circumstances.<sup>46</sup> Arguably, it marked the beginning of the voluntarist or abstentionist era: the essence of which was 'that collective bargaining is the preferred method of job regulation and legal enactment is accorded a necessary but secondary role'.<sup>47</sup> This,

however, must all be read in light of the fact that various bodies in society (both State and otherwise) differed in their perceptions of and commitment to voluntarism. Such differences were also to vary with the passing of time. A valuable illustration of this is provided by the report of the National Industrial Council (NIC).

The lack of minimum wage and maximum hours legislation in the UK has been an important component in the voluntarist theory. In the light of this it is worth recalling some of the recommendations made by the NIC. They favoured a maximum number of hours being stipulated by statute. The statutory limit would be capable of being raised or lowered through a collective agreement, provided the appropriate minister had no reason to deem it contrary to the public interest. The joint regulation of overtime within the mooted legal framework was also envisaged. A legal minimum wage was proposed as well. These proposals were made knowing that "The Government ... had no objection to the reduction of hours or the establishment of minimum wages by law provided that production costs did not suffer".<sup>48</sup>

With an improvement in the industrial relations situation the Government's enthusiasm for legislation steadily evaporated. With the employers' side deserting the cause Labour was left as the sole standard bearer. From 1924, under Rule 2 of its Constitution, the TUC included among its objects a legal maximum working week and a legal minimum wage for each industry or occupation.<sup>49</sup>

It can be seen, therefore, that the Union movement would have welcomed more in the way of regulatory legislation (and had the political pressure been sustained the government might have

conceded). The conception of the level of legal intervention which was compatible with a voluntarist system was considerably different to what it later became.

The State's lack of enthusiasm for regulatory legislation was on occasion extended to auxiliary legislation. So while the Trade Board's regime was boosted in 1918 the legislation was soon being administered in such a way that no Trade Board would be set up unless there existed both unduly low wages and no adequate machinery.<sup>50</sup>

In essence this was a reversion to the 1909 position. In 1921 a committee was established under the Chairmanship of Viscount Cave to inquire into the working and effect of the Trade Boards Acts of 1909 and 1918.<sup>50a</sup> The report of the Cave Committee was completely hostile to the policy of the 1918 reforms and believed the 1909 position as regards establishment of Boards should be re-enacted.<sup>51</sup> The Committee believed that legislation in this area should be limited to instances where "sweating" existed and that no scope existed for auxiliary legislation. Indeed, Cave had an aversion to State interference in industrial relations and would have been unlikely to support more than a minimal labour law framework. Subsequently "... a Bill was presented to Parliament which would have gone back even on the 1909 Act, and only a change of Government prevented its passage".<sup>52</sup>



### PART THREE: THE INTER-WAR PERIOD

During this period no Statute sought to make collective agreements directly enforceable. On the other hand, there were a number of moves to use the law to strengthen the impact of collectively agreed norms. Two types of legislation were involved: "Common rule"<sup>53</sup> provisions and "Fair Wages" provisions.

#### (1) "Common Rule" provisions

One means of increasing the impact of collective agreements is by legislation which gives effect to the "common rule". An early, though unsuccessful, attempt to enact such a provision came with the moving of the Industrial Agreements Bill, 1912. The Bill applied to agreements between employers and employees in or about the Port of London concerning wages, hours, or other conditions of labour. Either side of industry could apply to the Board of Trade to have such an agreement registered. The effect of registration would be that the terms of the agreement would become implied terms of the individual employment contracts and any attempt to contract-out would be void. The main motivation behind the Bill was the desire to prevent under-cutting and the problems arising as a result. In the words of Ramsay MacDonald, "The great difficulty has always been with the outsider, I mean the outsider both on the side of the employer and the men ... The result has been that the conditions of the agreement have been broken, and it was inevitable that a dispute would arise, and consequently a strike has taken place".<sup>54</sup>

The Industrial Councils Bill of 1924 passed its second reading by

236 votes to 16 "... and it was only the accident of dissolution which prevented it becoming law".<sup>55</sup> The crux of the Bill was Clause 3 which entitled an industrial council to submit any written decision for confirmation by Ministerial order. It is important to note that the Minister was obliged to make such a confirmation. This duty was, however, subject to certain provisions as to modification, etc. Any order made could apply to the whole or merely to a part of the industry and any evasion of, or non-compliance with, any order made was to be a criminal offence,<sup>56</sup> it being felt that the agreements made by JIC's required the support of legislation, the mover of the Bill claiming that "the lack of this power has caused many of these Councils to be disbanded, because they felt that there was no use in going on when they could not use any discipline over their members and had no power to bind them".<sup>57</sup>

The mooted legislation was clearly seen as a support for voluntary collective bargaining. Clause 4 demonstrated a strong commitment to voluntarism. It provided for the establishment of a central industrial board (CIB) composed of an equal number of representatives of employers and workers, one representative from each side to be appointed by each industrial council. The two principal functions of the Board were "The consideration of appeals against the interpretation of an order issued by the Minister" and "to act as an arbitration board in case of dispute if and when requested by both parties concerned".<sup>58</sup> Decisions made by the CIB were also to be the subject of Ministerial order and breach would be a matter for the criminal law.<sup>59</sup> The allocation of this adjudicatory role to JIC representatives demonstrates a desire to

draw on the industrial knowledge and expertise of labour and capital as much as possible. While the aim of the mooted legislation was to encourage conditions whereby voluntary collective bargaining might flourish the legislative structure would itself be based upon the better features of the existing voluntary machinery.

After initial opposition the TUC favoured such legislation: "In 1925 Congress resolved in favour of giving national agreements freely entered into by JICs or similar bodies the same validity as trade board agreements when the parties involved requested it."<sup>60</sup> Irrespective of the potential benefits trade unions and employers would have been a good deal less likely to welcome such legislative intervention twenty, or even ten, years previously.<sup>61</sup> On the other hand, support was not forthcoming from the Ministry of Labour. The Ministry persistently viewed requests for this type of legislation as for "... a law compelling the observation of agreements made by all JICs ..." rather than "... a law permitting compulsion to be applied when the JIC concerned and hence both employers and employed wished to possess such powers."<sup>62</sup> Another difficulty was a fear on the part of some trade unionists that legislation might lead to legal sanctions being deployed against trade unions and or employees.<sup>63</sup> Indeed at least one government minister believed that any legal provision on the 'common rule' should be accompanied by '... provisions which made it obligatory upon trade unions to observe the decision, that is to say, made it illegal for them to pay strike pay to those on strike against the decision, and made those responsible for any such act amenable to the law'.<sup>64</sup>

Clay made a number of more technical objections: "Sharp definition and precise statement are essential in any rule that is to be enforced in a court of law ... Joint Industrial Council determinations are not likely to satisfy this condition".<sup>65</sup> For example, "The terms in which agreements are couched are often very general; which raises no difficulty so long as the carrying out of them depends upon the people who made them, and any misunderstanding or obscurity can be corrected by reference back to the Council."<sup>66</sup> Though it must be said that this view sits rather uneasily with his belief that similar difficulties did not arise in the case of Trade Boards, their orders were "... drafted with a view to being enforced in the Courts".<sup>67</sup>

It may also be noted that the Bill sought to impose a duty on the Minister of Labour "... to promote the establishment of an industrial council in respect of every industry for which in his opinion the establishment of such council is practicable and expedient".<sup>68</sup> The Minister also had a role as regards the approval of the constitution and rules of industrial councils.<sup>69</sup>

A number of bills similar to the Industrial Councils Bill, 1924, were introduced in Parliament during the 1930s.<sup>70</sup> However, "... under the Governments of the 1930s there was never any real prospect of success".<sup>71</sup> One significant difference between the later Bills and the 1924 version was the absence of a Central Industrial Board.

An indication of TUC interest is provided by the fate of the Industrial Councils Bill, 1930. The TUC pressed for its

withdrawal in favour of the Rates of Wages Bill, 1931, which had been agreed to by the TUC and employers' representatives. "The agreed measure was presented in 1931, but at that time the Government had other things on its mind and by November the national Government was in power and hopes of the required legislation were doomed again".<sup>72</sup> The 1931 Bill applied to all agreements between trade unions and employers' associations and not simply to decisions of JICs. On the other hand, it only applied to agreements as to rates of wages.<sup>73</sup> Any order made entitled an employee in the industry (or part thereof) '... to receive from his employer wages at a rate not lower than the rate ... sanctioned'.<sup>74</sup> Enforcement was to be by way of civil action at the instance of the employee; no criminal sanction was contemplated.<sup>75</sup> It appears that there had been a measure of trade union opposition to Bills covering only JIC awards.<sup>76</sup> One reason for this may have been a suspicion that the true motivation behind the Industrial Council Bills was a desire "... to force JICs into every industry throughout the country".<sup>77</sup>

The Cotton Manufacturing Industry (Temporary Provisions) Act, 1934, was introduced at the request of the industry itself, the Minister of Labour remarking, in moving the Bill, "In this branch of this industry the system of collective agreements is in the process of disintegration and a state of chaos is threatened which could be disastrous to the industry and indeed to the country. ... The question before the industry now is how to secure that the whole principle of collective bargaining does not break down".<sup>77a</sup> The legislation sought to secure adhesion to the "common rule". An application could be made to the Minister of Labour seeking an

order to give statutory force to a collective agreement "as to the rate of wages" made between a trade union and an employers' organisation in the cotton manufacturing industry.<sup>78</sup> Should the application be successful a term would be implied into the individual employment contract making payment of the collectively agreed wage mandatory.<sup>79</sup> Moreover, failure to pay such a wage would be a criminal offence.<sup>80</sup>

Certain features of the legislation are worthy of note. First, any application had to be jointly made by both sides of industry. Legislation would not be allowed to jeopardise the relationship of the bargaining parties.<sup>81</sup> On the other hand, either side could unilaterally apply for an order to be revoked and the failure to require a joint application here demonstrates the preference for purely voluntary machinery.<sup>82</sup> Second, there was an express statutory prohibition on any order modifying the collectively agreed terms.<sup>83</sup>

The legislation appears to have been regarded as something of a success.<sup>84</sup> For example, a board of inquiry noted that only one prosecution had taken place in respect of a particular order "... but expressed ... satisfaction that this did not suggest that a "high standard of compliance" had not prevailed ... (and went on to comment that the industry had)... "for the first time for many years enjoyed immunity from the evil effects of wage-cutting and price-cutting"<sup>85</sup> Again Sharp reports that "Before the advent of War in 1939 the prospect of extending the machinery of the Act to the spinning branch of the industry was under consideration."<sup>86</sup>

The Act was a classic example of auxiliary legislation. As was stated in the House of Lords: "... the provisions of the Bill have been drawn up with the single aim of strengthening and upholding the principle of voluntary agreements, freely negotiated and loyally observed".<sup>87</sup> Indeed, the Act was originally to cease operating after three years but was subsequently renewed from year to year until being revoked in 1957.<sup>88</sup>

## (2) Fair Wages Provisions

During the inter-war period there emerged numerous 'fair wages' provisions. They were designed to promote adhesion to collectively set norms and often embodied collective agreements as the requisite standard much more explicitly than the 1909 Fair Wages Resolution. The insertion of such provisions into statute was generally uncontroversial. By way of example it is proposed to discuss the provisions which applied to the Road Traffic Industry.

Section 93 of the Road Traffic Act, 1930 made the holding of a road service licence conditional on an employer observing terms and conditions of employment which would comply with the current fair wages resolution.<sup>89</sup> This provision was aimed both at combating unfair competition and the payment of unreasonably low wages.

The Road and Rail Traffic Act, 1933 extended the foregoing provisions to cover further sections of the industry.<sup>90</sup> The Government having taken into consideration the potential dangers that a scheme containing an element of compulsion might have for the existing system of voluntary collective bargaining, a



Government spokesman acknowledging the "... risk of disturbing the network of industrial agreements which now covers a great part of the industrial field".<sup>91</sup> Following the Act the National Joint Conciliation Board was established "... in order to ascertain and fix rates of wages which would be considered fair for the industry ..."<sup>92</sup>

Interestingly enough, the Act had not obliged the Government to set up any such Board. "It had, however, the direct support and encouragement of the Minister of Labour and the Minister of Transport, which were given in accordance with an undertaking by the Government during the passage of the Bill through Parliament".<sup>93</sup> The Board "... endeavoured to do justice to existing known agreements in drawing up its scheme of wages and conditions. It accepted parts of some agreements as they stood and sought to adapt others".<sup>94</sup>

Public policy, at least formally, favoured voluntary collective bargaining, as the State's establishment of the Board demonstrates, and there arose "... formal recognition, throughout the industry, of the need for establishing and enforcing standard wages and conditions ..."<sup>95</sup> Again, due to the work of the Board, organisation in the industry improved.<sup>95a</sup>

The commitment to, and perception of, voluntarism varied between State organs. The Baillie Committee, which was set up in 1936 to review the regulation of wages and conditions of service in the Road Motor Transport Industry, believed in the efficacy of collective bargaining: however "... proper organisation of the industry ... is an antecedent condition of ... any effective method of regulating wages and working conditions."<sup>96</sup> Moreover,

voluntary collective bargaining was seen as "... a potent influence in securing industrial peace and stability and in promoting that close co-operation between employers and employees which is essential for the prosperity of the nation."<sup>97</sup> Legislation was viewed as a means of encouraging such developments and the Committee displayed a commitment to strengthening the existing measures in the road haulage sector. The Committee recommended, inter alia, that the "fair wages" award be an implied term of the employment contracts of the workers concerned. This was a less than novel recommendation but, more interestingly, it was also recommended that "... power be given to an appropriate enforcing authority to deal with non-observance of the terms of ... an award by judicial proceedings."<sup>98</sup> The task of selecting the enforcing authority was left to the legislature. Should a trade union be allocated a role in the enforcement of such standards the situation parallels collective enforcement of a collective bargain.

The aforementioned legislation proved to be a limited success. Subsequently the Road Haulage Wages Act, 1938 emerged as "... the outcome of requests made to the Minister by both sides of the industry to provide effective machinery for determining and enforcing proper rates of wages and conditions of service ..."<sup>99</sup>, the Government believing that the State had a duty to foster and encourage the establishment of voluntary collective bargaining machinery.<sup>1</sup> Hence the creation of a Trade Boards-type scheme for the road haulage industry.<sup>2</sup> Under the Act a Central Board had power to submit to the Minister proposals for fixing remuneration.<sup>3</sup> In framing such proposals the Board were obliged to "... take into consideration any decision of a joint industrial council,

conciliation board, or similar body relating to the remuneration of workers employed on road haulage work ..."<sup>4</sup> This obviously promotes obedience to collectively agreed standards.<sup>5</sup> At the same time, the Act's structure demonstrates a concern that its operation might have a regressive impact on already existing collective bargaining arrangements. Thus s.4(4) gave priority, in certain circumstances, to jointly agreed disputes procedures over the Act's own enforcement mechanisms. Anticipating the language of later trade union legislation one may categorise the subsection as a "contracting-out" provision: "The Government are anxious to minimise compulsion and to do everything possible to encourage and help voluntary wage negotiating machinery".<sup>6</sup>

### (3) Other measures

An example of an instance of auxiliary legislation of a unique sort was Part IV of the Railways Act, 1921.<sup>7</sup> This gave legal form to the collectively agreed procedures of the industry: s 62 provided that in the absence of agreement between management and labour disputes as to pay and conditions of service were to be referred to the Central Wages Board (CWB) or, on appeal, the National Wages Board (NWB). The CWB contained an equal number of representatives from both sides of industry. The NWB was similarly constituted but, in addition, contained representatives of the users of railways, with an independent chairman nominated by the Minister of Labour.

Despite this legislative intervention into the industrial relations of the railway industry no statutory obligation was placed on either management or labour apart from the statutory duty of

referral. In particular, any agreement reached would be purely voluntary in import. The unions had previously agreed that no industrial action was to be taken until one month after a dispute had reached the NWB, but this provision did not find its way into the legislation.<sup>8</sup> Finally, either side of industry could terminate the procedures laid down by the Act by giving twelve months' notice.<sup>9</sup> It can be seen that the result of resorting to law was simply to give a statutory basis to certain institutions of the industry. The legislation was in no sense comparable to a legally enforceable procedure agreement.

Flanders has commented that "(G)iven the pre-war resistance of most of the companies to full recognition of the unions, they felt more secure in having their agreements supported by law."<sup>10</sup> It seems very questionable whether this statement accurately depicts the motivation of the unions involved. In the light of the non-compulsory nature of the legislative scheme one might doubt whether labour felt more secure by virtue of its existence. While it has been said that "(o)n the whole the machinery worked exceedingly well over a very difficult period and was a great improvement on the pre-war position"<sup>11</sup> the impact of the law was arguably negligible.

It should also be recalled that, during the inter-war period, legislation in respect of wages was on occasion regulatory and not auxiliary. An example of this was the Agricultural Wages Bill, 1924, which was introduced by the first Labour Government.

This sought to impose a Trade Boards-type scheme for the industry.

Legislation was required because "... the labourers cannot get a living wage by trade union methods alone. The difficulties of organisation are so great that we cannot get our organisation strong enough to enforce it".<sup>12</sup> So poor were the prospects for collective organisation that it does not appear to have been envisaged that the implementation of the Bill would do a great deal to foster it. The Parliamentary debates make little mention of collective bargaining and simply focus on the regulation of wages by statute. The effect that legal regulation might have on trade union organisation and collective bargaining was not discussed. The Act which emerged was almost certainly intended to be regulatory in effect.

S 2(4) which prescribed the standard by which wages were to be fixed stated "In fixing minimum rates a committee shall, so far as practicable, secure for able-bodied men such wages as in the opinion of the committee are adequate to promote efficiency and to enable a man in an ordinary case to maintain himself and his family in accordance with such standard of comfort as may be reasonable in relation to the nature of his occupation." No reference was made to collectively agreed norms. S 1(1) provided for the establishment of an Agricultural Wages Committee for each County which came under a duty to fix minimum rates of wages. The tripartite composition of those councils resembled that of Trade Boards. It may be noted that the original bill had provided for minimum wages to be determined by a central body like a Trade Board but opposition amendments produced s 1(1).

#### PART FOUR: AN APPRAISAL

Any discussion of the period 1906-1939 must be set against the background of a widespread acceptance of the value of collective bargaining from about 1917 onwards. The Balfour Report on Industry and Trade stating that "collective bargaining between employers and workpeople has, for many years, been recognised in this country as the method, best adapted to the needs of industry and to the demands of the national character, for the settlement of the conditions of employment of the workpeople in industry".<sup>13</sup> The TUC was also firmly committed to collective bargaining and so were many employers.<sup>13a</sup> It was also a period which saw an unprecedented level of Government intervention in society (which obviously reached a peak during war-time). The question of State support for collective bargaining (particularly by means of the law) was a more controversial one.

Despite the acceptance of collective bargaining different approaches in the upper echelons of Government clearly existed. A comparison of the reports of the Balfour and Baillie Committees will illustrate.<sup>14</sup> The Balfour Committee believed that the collective bargaining system worked well and praised its flexibility. They also took the opportunity to make the ritual denunciation of compulsory arbitration. Successful collective bargaining was regarded as implying the "... existence of strong, active and representative organisations on both sides, interested in conducting voluntary negotiations and capable of enforcing the general observance of agreements which depend wholly on moral obligation".<sup>15</sup> And the role of law? The Committee appear to have

viewed the Trade Board's legislation as a prop to collective bargaining and to have approved of the law playing such an auxiliary role.

It must be said that the Committee's commitment to auxiliary legislation was distinctly lukewarm. Trade Boards were viewed as being "... only appropriate to those exceptional branches of industry which combine absence or weakness of organisation with relatively low rates of wages, and we should strongly deprecate the encroachment of this type of institution on the field of normal organised industry".<sup>16</sup> (On the other hand, some statutory support for JICs was backed and was seen as complementing the work of the Trade Boards.) Again, limited enthusiasm was shown for schemes like the Industrial Councils Bill of 1924. A number of criticisms (some rather technical) being made of that particular measure. On the other hand, scope was felt to exist for a bill of the 1924 type which was restricted to the fixing of the basic minimum rate of wages and would be enforced by civil action. The generally restrictive view taken by Balfour is demonstrated by his assertion that "... the action of the State has been generally confined, and ... should continue to be confined, to efforts to promote voluntary agreements between the parties by means of such conciliatory machinery as was originally established by the Conciliation Act of 1896..."<sup>17</sup>

The Baillie Committee too had been a firm believer in the virtues of collective bargaining. At the same time they had, within a more limited remit, appeared to be much more strongly committed to auxiliary legislation.<sup>00</sup>



### The Role of Law

Going hand in hand with the recognition of collective bargaining was the realisation that trade union recognition, strong trade union organisation, etc. were an essential part of this process. While legal regulation of industrial relations was not on the political agenda there was an absence of a generally accepted theory as to the residual role of law. It is suggested that, in essence, two distinct approaches existed.

#### (a) Minimalist

While acknowledging the virtues of joint regulation, this model was reluctant to countenance more than a minimal "propping up" through the medium of Labour Law. The Balfour Committee might be said to fall into this category; there the motivation may have been a concern that legislation might shift the balance of power too far in favour of labour. The Ministry of Labour frequently fell into this category. This is demonstrated by, for example, its lack of sympathy towards moves to give statutory powers to JICs and to make the Fair Wages Resolution more effective.

#### (b) Auxiliary

This model gives a much greater role to auxiliary legislation. So, for example, it is much more likely to support laws which would guard against undercutting. Both because of the threat posed to the institutions of collective bargaining and to the substantive gains capable of being secured thereunder. Thus we can point to TUC support for statutory backing to be given to JICs during a period when under-cutting was rife. The Ministry of Labour, during particular periods, also falls into this category. Again

it appears that a number of local authorities operated a much more stringent Fair Wages policy than central Government.<sup>19</sup> One also notes that as a result of the 1934 Act, a number of applications had been received from various industries "... for enabling legislation which would give them powers for the compulsory enforcement throughout their industry of joint agreements".<sup>20</sup> Adherents to the minimalist approach were possibly over-concerned with collective bargaining as a control device; viz the Balfour committee's desire for strong organisations "... capable of enforcing the general observance of agreements...". Where an economic recession was placing an effective curb on the power of labour, safeguarding collective bargaining might seem less important. In 1923 the TUC/Labour Party had expressed the view that there was a "... consistent policy of employers to invoke either State or joint machinery for fixing wages, at a time when Labour is in a strong bargaining position, and to repudiate and abandon all such "interference" at a time when Labour is comparatively weak. In the former case "industrial harmony" is the supreme principle, while now the salvation of industry lies in the uncompromising acceptance of individualism".<sup>21</sup> Adherents to the auxiliary model paid greater attention to collective bargaining operating in a meaningful fashion.

#### (c) Trade Disputes Act, etc 1927

One cannot depart from discussing the role of law without mention of the Trade Dispute and Trade Unions Act, 1927 which made a number of changes with regard to trade union law. The significance of these changes is, however, hard to assess. The Act restricted trade union rights in the following areas: trade union

disciplinary powers, picketing, political donations and organisation in the civil service. Major sympathetic strikes would, in future, risk encountering both civil and criminal sanctions. Finally, local authorities were barred from a union-only labour policy or from stipulating that their contractors employ union-only labour.

The legislation was strenuously opposed by the Labour opposition in the Commons; it being claimed that the Bill would cause grave damage to the industrial and political power of the Labour movement. On the other hand, it has been argued that "... the Act was more irritant than blood-bath ... (and that it) ... was probably the least that Baldwin and his fellow-moderates could have introduced".<sup>22</sup>

An attempt was made, during the passage of the Bill, to introduce an additional clause which aimed to stipulate a mandatory "cooling-off" period before strikes could take place in essential services. This would facilitate conciliation and a "... real investigation into the facts on which the merits of the case depend ...".<sup>23</sup> Again "... Chamberlain (and this had attracted considerable support in the Cabinet) had wanted to include a clause that no strike should be allowed to begin without the parties first submitting to a hearing by an Industrial Tribunal or, if this was disliked, a statutory committee of employers and men".<sup>24</sup> Such an element of compulsion may be regarded as limited and not terribly significant. One must, however, note that some backers of such ideas seemed to have viewed them as steps on the road to compulsory arbitration.

To what extent did the Act represent a break with voluntarism? On the face of it the provisions were not too weighty. The restrictions on the right to strike and the provisions on union-only labour would hamper the trade union role in collective bargaining (but not to any great extent). Government policy under Baldwin was disinclined to be restrictive. Indeed, in the run-up to the General Strike the Government seemed to be considering legislation in the auxiliary mould. For example, it was at one stage prepared to pass a bill "... to establish a national wages board on the lines of the railway wages board".<sup>25</sup>

#### CONCLUDING REMARKS

It is interesting to note that despite the number of proposals and interventions aimed at supporting collective bargaining no moves appear to have been afoot to compel or facilitate the direct enforcement of collective bargains. Fair Wages Provisions and the like obviously offered a measure of indirect enforcement. One explanation may be that the real issue may have been perceived to be not the behaviour of the parties to agreements but undercutting by other employers. The question of sanctions is also very relevant. The colliery dispute of 1941 is often cited as an illustration of the difficulties inherent in the use of sanctions against the forces of collective labour. However, the problem had been widely perceived for a considerable time. The unsuccessful attempt to enforce the Munitions Act against the South Wales miners in 1915 must, it is submitted, have been very influential in the long term.<sup>26</sup> Indeed, the Ministry of Labour were to adopt the view '...that formal sanctions against strikers, and non-

recognition, had proved unworkable as well as unacceptable'.<sup>27</sup>  
The climate of opinion as to legal enforceability is difficult to  
adjudge though s 4(4) of the 1871 Act imposed limitations.  
Undoubtedly a case could have been made out for a statute  
permitting legal enforceability at the option of the parties. If  
the parties wished to have access to the courts who could deny  
them that?

CHAPTER 3: LEGAL DEVELOPMENTS, 1906-1939

FOOTNOTES

- 1 Clegg et al, A History of British Trade Unions since 1889, Volume I, p 425.
- 2 For an interesting discussion of the extent to which Britain is governed by bureaucratic administrative means see Kahn et al, Picketing, pp 7-9. Cf O Kahn-Freund, Labour Law in Selected Writings at 12, '... no such legislation has to the best of my knowledge ever been demanded by the trade unions...' See also, Stair Memorial Encyclopaedia: The Laws of Scotland, Vol 22, paras 223-244.
- 3 E H Phelps Brown, The Growth of British Industrial Relations, p 324.
- 4 R Charles, The Development of Industrial Relations in Britain, 1911-1939, pp 140.
- 5 R M Martin, TUC: The Growth of a Pressure Group 1868-1976, p 146.
- 6 A Flanders, 'Collective Bargaining', in A Flanders and H A Clegg (eds), Industrial Relations in Great Britain, p 276.
- 7 A Fox, History and Heritage, pp 246-255.
- 8 R Davidson, Historical Journal, Vol 21 (1978), p 586.
- 9 Report on the Wages Boards and Industrial Conciliation and Arbitration Acts of Australia and New Zealand, Cd 4167, 1908, Report of the Select Committee on Homework, 1908.
- 10 Sweated Industries Bill, 1908, 1909.
- 11 Select Committee on Home Work, op cit, para 38.
- 12 ibid, para 48.
- 13 op cit, para 58.
- 14 HC debates on Trade Boards Bill, 1909, Vol II, Col 1791.
- 15 HL debates on Trade Boards Bill, 1909. Marquess of Lansdowne, Vol II, Col 1012.
- 16 O Kahn-Freund in A Flanders and H A Clegg (ed), The System of Industrial Relations in Great Britain, p 68. Subsequently Kahn-Freund was to say of the minimum wage legislation that 'In its outward appearance it belongs to regulatory legislation, but its policy is to assist collective bargaining.' O Kahn-Freund, Labour Law: Old Traditions and New Developments, p 28.
- 17 E Phelps Brown, op cit, p 309.

- 18 Indeed in 1909 there had been suggestions in government circles of moves towards compulsory arbitration. See E H Hunt, 'British Labour Law History, 1815-1914', p 326.
- 19 E H Phelps Brown, *op cit*, p 325.
- 20 S 1(2), Trade Boards Act, 1909.
- 21 S 1, *ibid*.
- 22 Sharp, Industrial Conciliation and Arbitration in Great Britain, p 25.
- 23 Askwith, Industrial Problems and Disputes, p 215.
- 24 Industrial Council Enquiry into Industrial Agreements, S P 1913, XXVIII.
- 25 *ibid* at p 4 (para 7).
- 26 E Phelps Brown, *op cit*, p 334.
- 27 British policy makers were also aware of similar difficulties faced by other countries eg the Canadian Lemieux Act.
- 28 Industrial Council Enquiry, *op cit* at para 33 (p 10).
- 29 *ibid* at para 58 (p 15).
- 30 *ibid* at para 32.
- 31 *ibid* at para 9.
- 32 R Charles, *op cit*, p 202. it may be noted that the government contemplated including an element of compulsory arbitration in the courts. Bill 1919. See Amulree, Industrial Arbitration in Great Britain, p 171.
- 34 Final Report on Relations Between Employers and Employed, (Cd 9153) p 4.
- 35 R Charles, *op cit*, p 148.
- 36 Interim Report, on Joint Standing Industrial Councils (Cd 8606) para 23.
- 37 H Clay, The Problem of Industrial Relations, p 153 et seq. Cf Charles, *op cit*, p 216.
- 38 Report on Conciliation and Arbitration, (Cd 9081) para 2.
- 39 Industrial Council and Trade Boards, Cd 9085, para 5.
- 40 Second Report on Joint Standing Industrial Councils, (Cd 9002) para 21.
- 41 *Ibid*, para 23.



- 42 *ibid*, para 11.
- 43 s 1(2), Trade Boards Act, 1918. It may be noted that the wording of the subsection was altering during the enactment of the legislation. The underlying policy, on the other hand, appears to have remained the same.
- 44 H C Debates Col 70, 1918, Col 107.
- 45 *ibid*, Col 71, 1918 Vol 107.
- 46 See, for example, the collapse of proposals for Labour Courts at the end of the War. G Rubin, 1985 ILJ 33.
- 47 Lewis, 1976 BJIR 1 at 8.
- 48 Charles, *op cit*, p 236.
- 49 Flanders, 1974 BJIR, 358.
- 50 Ministry of Labour, Administration of the Trade Boards Act, 1909 and 1918.
- 51 Report of the Committee appointed to inquire into the Working and Effect of the Trade Boards Acts of 1909 and 1918. Cmd 1645, 1922.
- 52 F J Bayliss, British Wages Council, p 13.
- 53 The term is believed to originate in the Webb's Industrial Democracy, pp 560 et seq.
- 54 Industrial Agreements Bill 1912, H C Vol 40, Col 220.
- 55 Charles, *op cit*, 206.
- 56 Clause 3. On the other hand, there do not appear to have been any civil law consequences.
- 57 H C Vol 174, Col 765.
- 58 Clause 4(1).
- 59 Clauses 3(2)(c) and 4(3).
- 60 Flanders, 1974 BJIR, 352 at 357, n 22.
- 61 Phelps Brown, The Growth of British Industrial Relations, pp 234-285.
- 62 Charles, *op cit*, p 206.
- 63 The fear that the use of the sanctions might back-fire proved to be a strong one for labour. For example, see the debates on the Industrial Councils Bill, 1933-34. H C Vol 286, Col 719 (Sir H Samuel).

- 64 Sir R Horne 6.11.1919. HC, Vol 120, Col 1711..
- 65 Clay, The Problem of Industrial Relations, pp 170-171.
- 66 *ibid* at 171.
- 67 *ibid*.
- 68 Clause 1(1).
- 69 Clause 2(1).
- 70 Eg The Industrial Councils Bill, 1930.
- 71 Charles, *op cit*, p 209.
- 72 *ibid*, pp 208-209.
- 73 Clause 1(1).
- 74 Clause 2(1).
- 75 Clause 2.
- 76 Debates on Industrial Councils Bill, H C Vol 206, 1933-34 Col 675.
- 77 *ibid*.
- 75 H C Vol 289, Col 1961.
- 76 H C Vol 289, Cols 1961, 1962.
- 77 Davies and Freedland, Kahn-Freund's Labour and the Law, (3rd ed), pp 177-184.
- 77a Vol 289, col 1961.
- 78 s 1(1) of the Act
- 79 s 3(a), *ibid*.
- 80 s 3(b), *ibid*.
- 81 s 1(1), *ibid*.
- 82 s 4(1), *ibid*.
- 83 s 2(2), *ibid*.
- 84 Sharp, Industrial Conciliation and Arbitration in Great Britain, p 409.
- 85 *Ibid*.
- 86 *Ibid* (n 4).

- 87 H L Vol 92, Col 921 1933-34.
- 88 S 8(2) of the Act, see Flanders, 1974 BJIR 352 at 356.
- 89 S 93(1). Road Traffic Act, 1930.
- 90 S 33(2). Road and Rail Traffic Act, 1933.
- 91 1932-33. H L Vol 89, Col 10, per the Secretary of State for Air.
- 92 Baillee, 23.
- 93 Ibid.
- 94 Ibid, para 27.
- 95 Ibid, para 32.
- 96 Ibid, para 35.
- 97 Ibid, para 36.
- 98 Ibid, para 115.
- 99 Ibid, para 118.
- 1 H C 1938, Vol 135, Col 1617, per the Minister of Labour (E Brown). It may be noted that Ernest Bevin had pressed very hard for the Bill to be passed. (See A Bullock, The Life and Times of Ernest Bevin, Vol I, p 618.)
- 2 Ibid, Col 1621.
- 3 S 2(1)(a).
- 4 S 2(4).
- 5 See also s 4(3) and s 5(3).
- 6 H C 1938 Vol 135, Col 1621, per the Minister of Labour (E Brown).
- 7 The provisions of Pt II of the Mining Industry Act, 1920 are also of interest. Amulree (op cit 170) points out, however, that Pt II '... proved abortive'.
- 8 Sharp, op cit, p 253.
- 9 S 62.
- 10 Flanders, 1974 BJIR 356.
- 11 Sharp, op cit, p 253.
- 12 H C Vol 174 [2R] 61 911, 1924.

- 13 Final Report of the Committee on Industry and Trade, p 90 (Cmnd 3282).
- 13a See Middlemas and Barnes, Baldwin, p 189.
- 14 Report of the Balfour Committee on Industry and Trade (Cmnd 3282, 1928-29) S P Vol VII. Report of the Committee on the Regulation of Wages and Conditions of Service in the Road Motor Transport Industry (Goods) Cmnd 5440, 1937 Vol XV.
- 15 Balfour Committee op cit, page 90.
- 16 Balfour Committee, op cit, p 125.
- 17 Balfour Committee, op cit, p 117.
- 18 See above, para
- 19 Bercusson, Fair Wages Resolutions, p 183.
- 20 Ibid, at 200.
- 21 Industrial Negotiations and Agreements (published by the TUC and the Labour Party, 1923) pp 10-11.
- 22 Fox op cit, p 335.
- 23 H C Vol 207, Col 844.
- 24 Middlemas and Barnes, Baldwin, pp 448-9.
- 25 Ibid at 421.
- 26 See discussion above of Whitley report at p 75.

## CHAPTER 4

### THE KAHN-FREUND THEORY

Academic writing on the law relating to collective agreements was conspicuous by its absence prior to the work of Kahn-Freund. His work proved to be highly influential and it is proposed to discuss its development in this chapter. The Kahn-Freund theory came to the fore in the case of Ford Motor Co v AUEW and I intend to discuss this case at length.<sup>1a</sup> Kahn-Freund came to Britain in 1933 from Germany. Subsequently he came to be regarded as '... the leading scholar of British and comparative labour law ...'.<sup>1b</sup> Indeed even on arrival in the UK '... he was already a brilliant technical and theoretician of labour law'.<sup>1c</sup>

In examining the development of the Kahn-Freund theory it is important to remember his German background and experience. One may note, for example, the influence of Professor Hugo Sinzheimer and the fact that Kahn-Freund's doctoral thesis was partly on the normative effect of collective agreements.<sup>1d</sup> Kahn-Freund's interest appears to have been inspired to some extent by the fact that the social importance of collective bargaining was neither reflected in case-law nor in legal literature.<sup>2</sup>

Kahn-Freund took the view that any collective agreement had a dual function: "... it constitutes a contract between the union and the employer or employers' association (contractual function) and at the same time it serves as a lex contractus for the contracts of employment coming within its orbit (normative function).<sup>3</sup> This

analysis is based on Sinzheimer's who, however, split the contractual function into two parts: "The obligatory (procedural arrangements, the obligation of the contracting organisations to observe the terms of an agreement and to induce their members to do likewise): and the organisational (the duty of individual employers and trade unionists to observe the terms of an agreement by virtue of their membership of one of the contracting organisations)." <sup>4</sup> This 'dual function' approach subsequently allowed Kahn-Freund to regard collective agreements as having legal effect at the individual level but not at the collective level. In the early 1940s, however, he regarded collective agreements as being legally enforceable at both levels.

In a famous article in the 1943 *Modern Law Review* Kahn-Freund discussed his view of the English position at greater length. <sup>5</sup> One may begin by noting that Kahn-Freund appeared to believe that one could make the distinction between conflicts of rights and conflicts of interest. He stated that issues as to rights were "... legal questions which - but for s 4 of the Trade Union Act, 1871 - could be taken before a Court of Law, and which can be solved by applying the law and interpreting the contract ..." <sup>6</sup> On the other hand, "... where no agreement exists or an existing agreement has expired, or where one of the parties wishes to alter an agreement in view of changed circumstances, there is no legal problem at all". <sup>7</sup> In stark contrast to his subsequently held view Kahn-Freund saw no reason to distinguish the British position from the continental. <sup>8</sup>

The difficulties of s 4 and restraint of trade aside, Kahn-Freund

expressed no doubts that, even at the contractual level, collective agreements were legally enforceable. Changes in the law of restraint of trade were also considered important, it being argued that a considerable number of collective agreements between employers' associations and trade unions would no longer be in restraint of trade at common law and would therefore be enforceable independently of the 1871 Act. A lack of case-law was apparent and Kahn-Freund acknowledged this. Technical legal problems, in particular s 4, and reliance on the threat/use of social sanctions may have been viewed as, to a large extent, explaining this situation.

Closely related to the belief that collective agreements have a dual function is the view that a trade union acts as principal, not agent, in signing a collective bargain. In suggesting that this was the British position Kahn-Freund was influenced by the views of Sinszheimer on this topic. The latter was opposed to the adoption of an agency approach not simply because of the technical difficulties but because the role of trade unions in German society was viewed from a collectivist perspective. In applying this theory to Britain the point was taken that a number of obligations could not sensibly be viewed as individual in nature: eg the fact that a collective agreement might lay down conditions upon which future contracts of employment are to be concluded. However, the corollary of all this was that "If ... the members of collective parties are not parties to the contract, they cannot derive any benefit under it ..." <sup>9</sup> Hence the need for the normative function.

Kahn-Freund turned his attention "... to the analysis of the legal



relationship between collective and individual agreements" in a case-note on True v Amalgamated Collieries of Western Australia Ltd<sup>10</sup> He noted that "... English law has not so far taken cognisance of the normative function of collective industrial law".<sup>11</sup> This would not pose any problems where the employment contract expressly incorporated collectively agreed terms. Even where this was not the case Kahn-Freund expressed the wish that the employment contract "... be deemed to have been concluded upon the terms of the collective bargain".<sup>12</sup> At this stage the legal mechanism/fiction by which this was to be achieved had not yet been discovered. However, in 1943 he expressed the view that a collective bargain could be regarded as custom and the appropriate terms implicitly incorporated: "... terms of employment can ... become usages which, like commercial customs in mercantile law, become the lex contractus, pre-determining the content of contracts of employment, unless contradicted by the express terms of those contracts".<sup>13</sup> This deployment of custom was not fully explored and Kahn-Freund left open such questions as whether the scope of the usage would apply to non-union members.

Kahn-Freund's particular collectivist perspective led him to make a number of interesting observations on the "peace obligation". He remarked that "where an association of employers is a party to the agreement, it undertakes to induce its members not to derogate, by individual contracts of employment, from the collective terms to the detriment of the workers. The trade union, in turn, undertakes not to resort to collective hostile action for the time of the currency of the agreement with the object of enforcing better conditions".<sup>14</sup> While many British collective agreements

would have contained some form of express peace obligation whether it would have been right to regard all agreements as containing such a restrictive implied obligation must be problematic. Kahn-Freund's view may well have been a product of his Weimar days. There, while trade unions and employers' associations were viewed as being autonomous from the State a certain corporatist role was envisaged for them.

By the time that the article "Legislation through Adjudication" was written Kahn-Freund had changed his mind as to the question of enforceability between the collective parties. He was to state quite categorically that "... voluntary collective agreements have never been directly enforceable in this country either in war or in peace time. They have, in Britain, no legal effect".<sup>15</sup> Why the change of view? Kahn-Freund cites an article in the 1931 Harvard Law Review<sup>16</sup> where the view is taken that in the UK breach of an "... agreement has no direct legal consequences".<sup>17</sup> The basis for this view appears to be s 4 of the 1871 Act, the case of Holland v London Society of Compositors<sup>18</sup> and an article by Geldart in the 1912 Harvard Law Review.<sup>19</sup> Geldart appears to have believed that collective agreements were not legally enforceable because of s 4, though he may only have been considering agreements between a trade union and an employer's association.

In a discussion with Professor Hepple, Kahn-Freund stated that he began to change his mind towards the end of the second war.<sup>20</sup> He acknowledges that contact with those who had a great knowledge of the history of industrial relations proved to be an immense stimulus.<sup>21</sup> Certainly Kahn-Freund's article on inter-group

conflicts and their settlement displays considerable knowledge of research into UK industrial relations.<sup>22</sup> In particular, he distinguishes between dynamic and static collective bargaining: "The static type prevails on the European Continent and largely in the United States, but also in some British industries, the "dynamic" type is a characteristic element of British developments."<sup>23</sup> The role of joint institutions was noted and where dynamic bargaining was involved those bodies took on a wide-ranging role: they were designed to permit a position whereby "... existing standards can be continuously adapted to changing conditions and the norm-creating process becomes permanent".<sup>24</sup> The existence of "dynamic" bargaining was said to explain the absence of fixed-term collective bargains in the UK and partly to explain the importance of unwritten agreements/practices.

Also of note was the distinction made in some systems between conflicts of rights and conflicts of interest. Kahn-Freund pointed out that the distinction tended not to be made in Britain though it is not quite so clear why he thought this was the case. It may have been that he believed that there was no need to make the distinction since agreements were not legally enforceable. On the other hand, it may be that it was considered that the distinction between rights and interests could not be made and that this went towards explaining the absence of law. In support of the former possibility one may cite a passage which states that "Conflicts of right and conflicts of interest do not have to be kept in watertight compartments where the rights are enforced mainly by social and not by legal sanctions ..."<sup>25</sup> In any event, the failure of industrial relations practitioners to make a

distinction which was central in systems where collective agreements were legally enforceable obviously impressed Kahn-Freund. He was later to stress that the same social sanctions were deployed in rights disputes as interests disputes; "... the uniform application of the same non-legal sanctions ... has almost obliterated in the consciousness of the people the distinction between a dispute about existing rights and a dispute about rights to be created ...".<sup>26</sup>

There were political reasons, too, for regarding as satisfactory the operation of collective bargaining in the UK. The absence of law was seen as evidence of a mature system of industrial relations. "Legal norms and sanctions are blunt instruments for the shaping of intergroup relations which have developed into a higher community".<sup>27</sup> The knowledge Kahn-Freund had acquired of UK industrial relations, in particular the importance of dynamic bargaining, had led him to the conclusion that collective agreements were not enforceable at law in the UK. However, s 4 and restraint of trade aside there was no reason in law to prevent enforcement. Kahn-Freund was to advance the theory that collective bargains were not legally binding because of a lack of intention to enter legal relations. This was a highly imaginative suggestion regarding the use of a rule which generally operates to deny domestic/social arrangements legal effect. Commercial contracts were generally regarded as legally enforceable in the absence of evidence to the contrary.

Gayler, writing in 1955, advanced four arguments against the view that collective agreements were intended to be binding in honour

only.<sup>28</sup> First, he argued that "... unless the agreement is of a domestic or social nature it would appear that the parties may only ensure that the terms of their contract are not legally binding upon them by expressly providing for this in their contract."<sup>29</sup> The main authority relied upon was Rose and Frank Co v Crompton (JR) & Brothers, Ltd,<sup>30</sup> it being asserted that a collective agreement was akin to a commercial arrangement, rather than a social one.

Secondly, reference was made to the fact that Bills had been brought forward to make the enforcement of JIC awards compulsory, Gayler arguing that "it cannot be thought that JICs would press for the compulsory enforcement of their agreements if they entered into them with the intention that they would be binding in honour only".<sup>31</sup> It is respectfully submitted that this conclusion does not follow. While JICs may not have intended their agreements to be legally enforceable they would have undoubtedly desired that they be adhered to. For example, the prospect of industrial action would be seen as promoting adherence. Should social sanctions prove ineffectual JICs would be perfectly entitled to press for legislation. Moreover, the main target of legislation of the "common rule" type is the "outsider".

Thirdly, "No "clear judicial authority" can be produced to support the view that collective agreements are binding in honour only".<sup>32</sup> Indeed, as we shall see when we come to the Ford Case, the authorities, such as they were, tended to assume that collective agreements were directly enforceable in law. However, it is obvious that a legal proposition can be correct despite the absence

of direct authority on the point.

Finally, it was argued that in the United States, where there was no equivalent of s 4, actions are brought for breach of collective agreements. Gayler found it difficult to accept a disparity in intention between the collective parties in the USA and the UK. This does not seem to be a particularly strong argument. Labour Law and collective bargaining in the US have developed in markedly different ways and such disparities should not be seen as too surprising.

It can be seen, therefore, that the real point of contention between Gayler and Kahn-Freund was over the application of the doctrine of intention to enter legal relations. This was to come to the fore in the Ford Case.

In 'Legal Framework' Kahn-Freund stated that "... Whether the agreement express this or not, a trade union, and an employer or employer's association in signing it, undertake to "keep the peace" ie to put it at its lowest, not to resort, during the currency of the agreement, to strike or lock out for the sake of changing the terms agreed upon".<sup>33</sup> So Kahn-Freund adhered to his belief as to the content of an implied peace obligation, even though, in his view, legal sanctions would no longer be available to enforce it.

Kahn-Freund referred to three cases which dealt incidentally with the question of legal enforcement. The first of these was Read v Friendly Society of Stonemasons<sup>34</sup> which concerned the tort of inducing breach of contract. The defendant trade union argued



that a breach of a collective agreement by the employer supplied a justification for the action. The defence was not made out but the collective agreement was assumed to be legally enforceable (subject to considerations of restraint of trade). Smithies v National Association of Operative Plasterers<sup>35</sup> was a similar case and, again, the collective agreement involved seems to have been treated as a normal contract. There is also an obiter statement by Lord Russell of Killowen in delivering the advice of the Privy Council in Young v Canadian Northern Railway Co<sup>36</sup> On one reading he seemed to assume that a collective agreement could not be enforced by legal remedies but only by strike action. Another relevant case is East London Bakers' Union and Goldstein<sup>37</sup> though this was not mentioned in "Legal Framework". There the English Court of Appeal seemed to regard a collective agreement as legally enforceable.

Kahn-Freund was to be a highly influential member of the Donovan Commission but in 1965 he had again set out his views on the legal status of collective agreements in the UK.<sup>38</sup> He justified his view that collective bargains lacked contractual intent by pointing to the absence of litigation: "The absence of such decisions, though not conclusive, is an indication of the attitude of the world of industry on both sides..."<sup>39</sup> (It may be objected that, as with the failure to sue strikers for breach of the employment contracts, the absence of litigation represents a wish for better industrial relations in the future.)<sup>40</sup> This empirical position was, moreover, seen as one eminently justifiable on policy grounds. To someone heavily influenced by experience of the Weimar Republic the lack of legal intervention, and the strength of self-



regulation, in collective bargaining were admirable.

As early as 1943 Kahn-Freund had noted the "British preference for voluntary institutions" and the fact that "the proud edifice of collective labour regulation was built up without the assistance of the law".<sup>41</sup> If the collective parties did not seek to enforce through law collective bargains could this empirical fact not be translated on to a more theoretical plane. In deploying the requirement of "intention to enter legal relations" that was precisely what Kahn-Freund did. Consequently the plaintiffs in the Ford case found it much more difficult to establish that the collective agreement was intended to be legally enforceable. Indeed by translating the practice of employers and trade unions into a legal theory Kahn-Freund was actually to influence the future practice of industrial relations. The theory of voluntarism, and in particular the position on non-enforceability, can be seen as attaining the status of a prescription for good industrial relations.

Kahn-Freund felt his view was reinforced by the nature of British collective bargaining. In particular, the importance of dynamic bargaining and the prevalence of custom and practice. Kahn-Freund was also now uncertain as to whether a peace obligation would be implied into British collective agreements. Moreover, there would "be nothing to say ... to what extent the Continental view of the "relativity" of the peace obligation could be read into English law."<sup>42</sup>

Chapter eight of the Donovan Commission Report, which deals with

the enforcement of collective agreements, was drafted by Kahn-Freund and his influence is apparent.<sup>43</sup> Of considerable importance was the Commission's endorsement of the "no-intention" theory. The compatibility of this view with the practice of British industrial relations was emphasised (eg dynamic bargaining). One gains the impression that the more Kahn-Freund learned about British industrial relations the more convinced he became that his view was to enforcement was right. Thus Chapter eight details the difficulties in identifying the parties to agreements. For example, "whether a shop steward or shop stewards' committee bargaining at plant or workshop level could, in the legal sense, be regarded as acting for the union or unions concerned, or for the individual workers, is a difficult question ..."<sup>44</sup> The problem as to parties had, hitherto, not been given much attention in Kahn-Freund's writings. The Commission were not, in principle, opposed to the use of legal sanctions and set out a potential scheme for the selective legal enforcement of procedure agreements.<sup>45</sup> This revealed something about Kahn-Freund's particular pluralist perspective. As Lewis has pointed out this particular model "... implied a narrow idea of legitimate industrial conflict and ultimately of trade union function."<sup>46</sup>

In 1969 the Ford Motor Co<sup>47</sup> case gave the opportunity for the competing views as to legal enforceability to be tested before Geoffrey Lane J. The dispute stemmed from negotiations over pay and a proposed settlement which involved "penalty clauses". The unions at Fords bargained through the medium of a national joint negotiating committee (NJNC) which comprised representatives of 15 different unions (and 3 representatives of sections within unions)

as well as representatives of the Company. On 11 February 1969 Ford's side and a majority of the union side on the NJNC reached agreement. However, unofficial strike action broke out and this was subsequently made official by the AEF and the TGWU. Fords then sought injunctions to restrain the unions from attempting to procure variation of the existing collective agreement otherwise than by constitutional action and for a mandatory injunction ordering the unions to call off the strike. On 27 February 1969 an ex parte injunction was granted. On 3 March 1969 a further hearing was held before Geoffrey Lane J.

Union-Management relations at Fords were basically covered by a 1955 procedure agreement and a 1967 price list agreement. The former agreement provided that "... at each stage of the procedure set out in this agreement, every attempt will be made to resolve issues raised and that until such procedure has been carried through there shall be no stoppage of work or unconstitutional action". The 1967 agreement provided that any variation should be negotiated through the NJNC and that termination of the agreement required three months' notice. Ford alleged that the unions had deliberately broken both the 1955 and 1967 agreements.<sup>48</sup>

The case turned on whether the parties had intended the agreements to be legally enforceable. It was argued that "It is significant that in many of the cases already cited the collective agreements there considered were discussed on the basis that they were ordinary legal contracts, and none of the distinguished judges or counsel or their union clients took the point that such agreements were not binding."<sup>49</sup> Two of those cases have already been

discussed: Smithies and East London Bakers' Union.<sup>50</sup> A third case was Bradford Dyers' Association Ltd v National Union of Textile Workers,<sup>51</sup> where the defendant unions had expressly agreed in submitting to a consent judgment that the collective agreement involved was binding and enforceable. A fourth case cited by the plaintiff was Holland v London Society of Compositors<sup>52</sup> which involved an agreement between two trade unions and it would be difficult to draw any conclusions as to the legal enforceability of collective agreements from it. National Coal Board v Galley<sup>53</sup> was also cited and it was submitted by the plaintiffs that "... the point of enforceability of the NACODs Agreements was expressly argued and the Court of Appeal dealt with and rejected that argument."<sup>54</sup> However, that case concerned the contractual obligations of individual employees and any discussion of enforcing collective agreements dealt in essence with enforcement at the individual level. Counsel for the plaintiff were anxious to distinguish the following dictum of Lord Russell dictum in Young: "If an employer refused to observe the rules, the effective sequel would be, not an action by any employee, not even an action by Division No 4 against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied." Counsel argued that "Lord Russell was saying only that the union had a more effective weapon to hand than action in the Courts, namely, the power to call a strike, and the union would exercise this power to achieve its aim rather than take legal action".<sup>55</sup> In truth it is difficult to ascertain what Lord Russell meant. Geoffrey Lane J. did not find these authorities helpful. While this is understandable the dicta inclined more towards enforceability than against.<sup>56</sup>

The case was decided by applying the general law as to intention to enter legal relations. One might have assumed that a collective agreement concerned the business and economic relations of the parties. In such a case the onus of proving a lack of intention to enter legal relations would be on the party relying on it.<sup>57</sup> Geoffrey Lane J. did not regard the agreement as a commercial one; nor, for that matter, did he regard it as an agreement concerning social or domestic matters, so how was the question to be resolved? In the words of his Lordship "In the present case there is no express provision by the parties to provide any assistance as to their intentions. Consequently, it is necessary to look at all the surrounding circumstances to ascertain what the intention of the parties was".<sup>58</sup> The judge made reference to Fords' chief negotiator: "... Mr Blakeman, the protagonist of Fords ... remained silent as to any intention on his part or that of Fords that these agreements should have any legal effect."<sup>59</sup> This would seem to be of doubtful relevance; contract law is concerned with outward manifestations of intention.

Counsel for Fords asserted that the "... primary matter to be considered is the form and wording of the agreements themselves."<sup>60</sup> Certainly, in Ardley and Morey v London Electricity Board, Pearson J saw his function as one of construction of the agreement.<sup>61</sup> In that case it had been argued that a declaration made at the end of a strike was a legally binding promise. In rejecting that contention the judge indicated that the factor which had impressed him was the wording of the declaration itself. Geoffrey Lane J was, however, to pose the question, "What then was the general state of opinion as it existed during these times?"

This might be expected to reveal how a "reasonable" trade union/employer would have viewed a collective bargain. This might furnish an objective view different from the view a Court might have formed by simply looking at the form and wording of the agreement. Testing objectivity by ascertaining "the general state of opinion" might seem a curious process for a Court to enter into. Nevertheless, it can be argued that industry's opinion as to the legal status of collective agreements would be a factor which might well be helpful in any objective assessment. As Devlin J stated in Parker v Clark, "The question must, of course, depend on the intention of the parties to be inferred from the language which they use and from the circumstances in which they use it."<sup>62</sup>

The Court sought to establish "the state of opinion" by reviewing a number of publications "... which inevitably would have come into the hands of ... (the parties) ... to shape their views, shape their opinions, and more importantly shape their intentions when making these agreements".<sup>63</sup> The views/opinions of either party would not seem material. The question could only be solved objectively. Nevertheless, the Court flirted with a more subjective approach and one relevant publication was found to be Kahn-Freund's "Legal Framework" where he asserts a belief in lack of enforceability. Gayler's conflicting view was cited to the Court but the judgment makes no mention of this. Kahn-Freund's earlier view, in the 1943 *Modern Law Review*, was referred to but was discounted on the basis that that particular publication was "... unlikely to come into the hands either of the executives of Fords or indeed of the executives of the union ... (and was not likely) ... to have affected the minds of the parties' officers or



their predecessors in title".<sup>64</sup> However, while the parties may not have been readers of the Modern Law Review that publication may well have influenced others involved in the industrial relations field and thereby had an impact on the "climate of opinion". And how many people in industry would have come into contact with the views expressed in Legal Framework? The Donovan Commission's view that collective agreements were not legally enforceable was also canvassed. However, one must note the role played by Kahn-Freund in the formation of this part of the report. Again, the Donovan Commission did not report until 1968 and obviously could not have influenced opinion at an earlier date though nevertheless it may be an accurate reflection of post-war opinion on this subject. Ministry of Labour, CBI and TUC evidence to Donovan all fell into the non-enforceability school.<sup>65</sup> While the precise approach of the Court was to look to publications which would have been likely to have been read by the parties, when the 1955 agreement was signed all that would be published would be the two competing views by Kahn-Freund,<sup>66</sup> and probably Gayler's Industrial Law. The publication by Kahn-Freund in favour of legal enforceability would have been in circulation for the longest period of time. The end result is that, "Legal Framework" apart, there was no publication cited to the Court which advanced the non-enforceability view prior to 1955. Nevertheless, the Court in Ford concluded that "... certainly since 1954 the general climate of opinion on both sides of industry has overwhelmingly been in favour of no legal obligation from collective agreements."<sup>67</sup> It must also be stressed, taking into account all the publications considered by the Court, that the influence of Kahn-Freund looms large.



Having considered the "extra-judicial" authorities the Court in Ford then had regard to the terms of the agreements themselves. Counsel for the defendants placed considerable emphasis on the dual function of collective agreements, it being argued that "The collective bargain is made with a twofold purpose. First, it incorporates clauses which it is intended from the start shall become part of the contract between the employer and the individual employee. These terms are clear and precise ... Secondly, there are other terms of the collective bargain which are never intended at any stage to give rise to obligations between anybody. It is manifest from the language and content of these terms that the nature of the obligation the parties intend to create by them is not legal."<sup>68</sup> One may question the strict dichotomy mooted between terms appropriate for incorporation and those which are not. It is suggested that terms may be incorporated despite being less than clear and that terms may be inappropriate for incorporation despite their manifest clarity. Nevertheless, it was argued that the "vague aspirational wording" of many of the clauses regulating collective relations "...makes it as clear as can be that the parties could not possibly have considered that these contracts would be enforceable in a court of law".<sup>69</sup> This line of attack was well received by the Court who expressed the view that "Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement and reached against a background of opinion adverse to enforceability are ... not contracts in the legal sense and are not enforceable at law".<sup>70</sup> Thus the Court were asserting that a more orthodox method of objective assessment of intention, ie construction of the agreement's wording, would produce the same result.

Let us compare the judicial approach in the Ford case with that taken in NCB v Galley.<sup>71</sup> In that case the Court of Appeal did not view collective agreements as being a class apart from commercial agreements. Indeed, in dealing with issues such as the alleged vagueness of the collective bargain the Court sought help in precedents in the commercial law field. Thus reliance was placed on Hillas & Co Ltd v Arcas Ltd<sup>72</sup> where it had been argued that the contract was incomplete. The contract was held to be valid with apparent gaps in the framework of obligations being filled by implication, the Court in Hillas & Co Ltd v Arcas taking a broad view of their function, Lord Wright reasoning that "... in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract: save for the legal implication... such contracts might well be incomplete or uncertain, with that implication in reserve they are neither incomplete nor uncertain".<sup>73</sup> So in the field of commercial contracts the Courts will go to considerable trouble to make agreements legally effective. This is despite the fact that the materials on which they will have to form their decision will often be somewhat rudimentary. The Court in NCB v Galley saw collective agreements as being on a par with commercial contracts in general and requiring the same approach. To look at the facts of the case in closer detail, it had been asserted that Clause 15 was "... typical of an industrial agreement not intended to be enforceable in the Courts."<sup>74</sup> Clause 15 dealt with complaints relating to unreasonable levels of hours of work being required of deputies. Such complaints were to be "... settled by discussion in such manner as the board and association in the division shall

agree."<sup>75</sup> No objection to this Clause was, however, taken by the Court and it was stated that "... once discussion is repudiated or fails the matter falls to be determined by the Courts."<sup>76</sup> A Court would, presumably, decide what was reasonable. The Court drew on Foley v Classique Coaches Ltd for support.<sup>77</sup> There a contract of sale made no stipulation as to price and it was held that a term should be implied that the price be a reasonable one. The litigation in NCB v Galley arose over the contractual obligations of individual employees but the Court made clear it would strive to keep collective obligations within a legal framework.

Having looked at NCB v Galley, let us look at the collective clauses which seemed, to the eyes of Geoffrey Lane J, to suggest unenforceability. Clause 3(a) referred to an "... adequate number of representatives ..."<sup>78</sup> Clause 4 contained an individual grievance procedure with several stages which potentially culminated in a report to "... the personnel manager who will then arrange for a discussion between the appropriate persons concerned."<sup>79</sup> In the latter case, counsel for the defendants argued the Clause "... could not possibly be enforced effectively at law when there are no time limits imposed for any of the steps taken."<sup>80</sup> Would the Court in NCB v Galley not have felt able to decide what amounted to adequate representation and also to imply a term saying that the time limits were to be reasonable and specifying what would be reasonable in the circumstances?

It may be noted that the judgment in Ford does not raise the possibility of severance. On general contractual principles the fact that a particular clause (or indeed clauses) would be too

vague to be enforceable would not invalidate the "whole contract if severance were possible". Thus in Nicolene Ltd v Simonds a particular clause could be "... rejected without impairing the sense or reasonableness of the contract as a whole and should be rejected".<sup>81</sup> It is important to consider how important and central the clause sought to be severed is to the contract. Treitel has pointed out that "... the Courts do not expect commercial agreements to be drafted with strict precision, and will, particularly if the parties have acted on an agreement, do their best to avoid striking it down on the ground that it is too vague".<sup>82</sup> It might be thought likely that the Court in NCB v Galley would have at least considered going down this road.

The Court in Ford could approach its task unhampered by direct authority on the direct enforcement of collective agreements. The Court though seemed inclined to find in favour of the defendants. Thus it readily accepted the view that cases involving intention to enter legal relations could not simply be divided into the category of commercial agreements, on the one hand, and social/domestic on the other. Collective agreements, while prima facie commercial arrangements, would not be presumed to be enforceable. The result of this approach was to ease the evidential burden on the defendants. Yet at this time the text books were divided as to whether the "no intention" cases could be divided into two classes or not.<sup>83</sup> Again, while the authorities did not amount to terribly much they would seem to have inclined in favour of Fords. Yet this weighed but little in the judicial scales. Why incline in favour of the defenders? Lewis reports that "During the time the injunctions were in force, the strike continued unabated and

negotiations and mediation were halted."<sup>84</sup> The fact that the law might have been viewed as irrelevant may well have influenced Geoffrey Lane J.

The test applied by the Court in trying to ascertain the parties' intentions is not clear. At times it seems that the Court was searching for the actual intention of the parties. "... Where a court is endeavouring to discover the intention of the parties to an agreement, it is impossible and indeed unreal to disregard evidence of their knowledge and accordingly of their state of mind at the time."<sup>85</sup> However, such a subjective approach would be unusual in contract law. On the other hand, while the parties' intentions would manifest themselves in the form and wording of the agreements, the agreements did not prove to be the focal point of the Court's endeavours. Instead, searching for the general climate of opinion proved to be the paramount consideration. What is the significance of this? At one level it can be said that any future case involving the enforcement of a collective agreement would depend on the actual intention of the parties in that particular case. It must be said though that the search for the general climate of opinion puts a different complexion on things. Should the climate be found to remain against enforceability it may be treated, as in Ford, as a presumption against enforceability. Obviously, if a collective agreement had an express provision governing enforceability that would be decisive at common law. In the absence of such a clause, it might be difficult to infer that the parties intended an agreement to be legally enforceable.

An interesting argument as to Parliament's view as to legal enforcement was produced by the second defendants. It was stated that s 3 of the 1906 Act offered no protection against procuring a breach of a commercial agreement or a contract other than a contract of employment. The argument continued: "is it conceivable that, if the legislature had thought collective agreements were enforceable at law, it would have protected the official but left him open to action for procuring a breach of a collective agreement?"<sup>86</sup> The conclusion drawn was that Parliament in 1906 must have imagined that collective agreements could not be legally enforced. This argument has considerable merit. An alternative explanation would be that the passing of the 1906 Act very much represented the enactment of specific solutions to the immediate problems of the time. Given that trade unions had been sued for directly inducing breach of employment contracts, an immunity was called for. At this time strike action had not led to trade unions being sued in contract/tort for breach of a collective agreement. Parliament was, therefore, much less likely to confer an immunity. In any event, even if the argument is accepted it is only relevant in so far as it evidences Parliament's contribution to the formation of the "climate of opinion".

Kahn-Freund's final declaration of his view of the relationship between collective agreements and the law came in the second edition of *Labour and the Law*.<sup>87</sup> Membership of the Donovan Commission had increased his knowledge and understanding of U.K. industrial relations. This had confirmed his belief that legal enforcement of collective agreements would be inappropriate. The fate of the Industrial Relations Act was regarded as providing



empirical evidence of this: "Those who at one time thought that collective agreements could be made into legally binding contracts by the ipse dixit of the legislature were, as events have shown, insufficiently aware of the social facts to which I have referred."<sup>88</sup>

Labour and the Law emphasises the significance that the practice of collective bargaining has for the use of the law. Thus the emphasis on the importance of dynamic bargaining and the consequent failure to make the distinction between conflicts of rights and conflicts of interests. He offers this, possibly with even greater conviction than in 1954, as an explanation for the fact of non-enforceability: "... it is (to say the least of it) exceedingly difficult to apply to collective bargaining of the ... (dynamic) ... variety the categories of the law of contract ..."<sup>89</sup> The evidence and research papers to Donovan must have been very influential in confirming Kahn-Freund's existing views.

The importance of custom and practice is also discussed. In addition, the wording of some agreements was said to render them void for uncertainty. The complex structure of bargaining levels was also regarded as being relevant. This reminds us of Donovan's concern that it might prove very difficult to identify the parties to an agreement. However, despite the technical difficulties that enforcement would present Kahn-Freund took a very pragmatic view: "That collective agreements are not contracts is due to the structure of bargaining, but if social necessities required it, such difficulties would have to be faced and, if possible, overcome. It is a matter of social expediency, not of social



ethics."<sup>90</sup> The real question was whether legal sanctions would promote greater adherence to collective agreements. Consequently he discussed, seemingly with approval, Donovan's proposals for selective enforcement.<sup>91</sup> Nevertheless, any such scheme was viewed as exceptional and, in general, the use of law was not recommended. Any notion that collective bargaining reform could be "... achieved through the creation of a "legal framework" was as realistic as the idea that the common law could, by a stroke of the legislative pen, be transformed into a codified system."<sup>92</sup> Thus, while "wildcat strikes" were singled out as remaining a problem, it was industrial relations reform that was to provide the answer.

By the mid 1960s industrial relations law reform was very much a "live" issue. Much attention was focused on the legal status of collective agreements. This tended to be very much tied in with the issue of unofficial strikes and the search, in certain quarters, for a device whereby the unions could be utilised to control such action.

CHAPTER 4: THE KAHN-FREUND THEORY  
FOOTNOTES

- 1a [1969] 2 QB 303.
- 1b O Kahn-Freund, Labour Law and Politics in the Weimar Republic, R Lewis and J Clark (Ed), Editor's Foreword.
- 1c *ibid.*
- 1d O Kahn-Freund, Labour Law and Politics in the Weimar Republic (ed R Lewis and J Clark).
- 2 O Kahn-Freund, Collective Agreements under War Legislation, 1942-43 MLR Vol VI, p 112.
- 3 O Kahn-Freund, True v Amalgamated Collieries, 1940-41 MLR Vol IV 225 at 225. See also O Kahn-Freund, Collective Agreements under War Legislation, *op cit*, p 112, pp 113-119.
- 4 O Kahn-Freund, Labour Law and Politics in the Weimar Republic, *op cit*, p 39.
- 5 O Kahn-Freund, Collective Agreements under War Legislation, *op cit*, p 112.
- 6 *Ibid* at 138.
- 7 *Ibid.*
- 8 For example, see O Kahn-Freund, Labour and the Law, (2nd edn) p 54.
- 9 O Kahn-Freund, Collective Agreements under War Legislation, *op cit*, p 112 at 115.
- 10 O Kahn-Freund, True v Amalgamated Collieries, *op cit*.
- 11 *Ibid* at 226.
- 12 *Ibid.*
- 13 O Kahn-Freund, Collective Agreements under War Legislation, *op cit*, p 112 at 117.
- 14 *Ibid.*
- 15 O Kahn-Freund, 'Legislation through Adjudication' (1948), Vol 11, pp 269-289, pp 429-448 at 271.
- 16 W G Rice, "Collective Labor Agreements in American Law" 44 Harv LR 572 (1931).
- 17 *Ibid* at 575.
- 18 1924 TLR Vol 40, p 440. The case deals with s 4 of the 1871 Act.

- 19 W M Geldart, *The Status of Trade Unions in England*, 1911-12 Harv LR, Vol 25, p 579.
- 20 1979 ILJ Vol 8, p 197 at 200.
- 21 R Lewis also notes another factor which influenced Kahn-Freund's thinking. During the war '... Kahn-Freund planned a "systematic analysis of collective agreements and a legal analysis of type of conditions". Although this research was never completed it fostered a growing conviction in him that British collective agreements were drafted in such a way that they could not be regarded as contracts' [1979] MLR 613, Vol 42.
- 22 *Inter Group Conflicts and their settlement*. This article is re-printed as Chapter Two of *Selected Writings*.
- 23 *Ibid* at 52.
- 24 O Kahn-Freund, *Selected Writings*, chp 2 (*Inter Group Conflicts and their Settlement*), 53.
- 25 O Kahn-Freund, *Selected Writings*, chp 2 (*Inter-Group Conflicts and their Settlement*), 57.
- 26 O Kahn-Freund, 1969 CLP 1 at 9.
- 27 O Kahn-Freund, *Selected Writings*, chp 2 (*Inter-Group Conflicts and their Settlement*), 54.
- 28 J H Gayler, *Industrial Law* (1955).
- 29 *Ibid* at 173.
- 30 *Rose and Frank Co v. Crompton Bros* [1923] 2 KB 261.
- 31 J H Gayler, *op cit*, at 174.
- 32 J H Gayler, *op cit*, at 174.
- 33 O Kahn-Freund, 'Legal Framework' in A Flanders and H A Clegg (eds.), *The System of Industrial Relations in Great Britain*, p 55.
- 34 [1902] 2 KB 702.
- 35 [1909] 1 KB 310.
- 36 [1931] AC 83, 89.
- 37 *The Times*, 9 June 1904, K W Wedderburn, *Cases and Materials on Labour Law*, 272.
- 38 O Kahn-Freund, Report on the Legal Status of Collective Bargaining and Collective Agreements in Great Britain, in Kahn-Freund (ed), *Labour Relations and the Law*.

- 39 Ibid at 25. Reference may usefully be made to the discussion of Gayler's third argument, *supra*, p 112-113. Neither argument has much force.
- 40 Royal Commission on Trades Unions and Employer's Associations (Cmnd 3623), para 463. The existence of s 4(4) and difficulties in suing trade unions (see above Ch 2) were also significant.
- 41 O Kahn-Freund, *Collective Agreements under War Legislation*, *op cit*, p 112 at 120.
- 42 O Kahn-Freund, *Report on the Legal Status of Collective Bargaining and Collective Agreements in Britain*, *op cit*, p 43.
- 43 Royal Commission on Trade Unions and Employers' Associations (Cmnd 3623). On Kahn-Freund's role in the production of the report see H A Clegg, *Otto Kahn Freund and British Industrial Relations*, in Lord Wedderburn et al (ed), *Labour Law and Industrial Relations*.
- 44 Royal Commission on Trade Unions and Employers' Associations (Cmnd 3623), para 477.
- 45 Royal Commission on Trade Unions and Employers' Associations (Cmnd 3623), paras 500-518.
- 46 R Lewis, 1979 Vol 8, ILJ 202 at 210.
- 47 Ford Motor Co v AUEF and TGWU [1969] 2 QB 303.
- 48 For an excellent account of the legal and industrial events which took place, see R Lewis, *The Legal Enforceability of Collective Agreements* (1970) 8 BJIR 313.
- 49 Ford Motor Co, *op cit* at 315.
- 50 See above p 114. Read v Friendly Society of Stonemasons was not cited. [1902] 2 KB 702.
- 51 The Times, July 24, 1926. The case is discussed by N Selwyn, 'Collective Agreements and the Law', Vol 32, 1969 MLR 377.
- 52 (1924) 40 TLR 440.
- 53 [1958] 1 All ER 91.
- 54 Ford Motor Co, *op cit* at 309.
- 54a Young v Canadian Northern Ry Co [1931] AC 83, 89.
- 55 Ford Motor Co, *op cit* at 310.

- 56 In Pitman v Typographical Association, The Times, 22.9.1949 (K W Wedderburn, Cases and Materials on Labour Law, p 279) it was submitted that the collective agreement '... was not really a contract at all, and was not intended to have legally binding force'. In refusing to grant an interlocutory injunction Mr Justice Devlin declined to comment on this contention.
- 57 G H Treitel, The Law of Contract (6th edn) p 130.
- 58 Ford Motor Co, op cit at 324.
- 59 Ford Motor Co, op cit at 324.
- 60 Ford Motor Co, op cit at 309.
- 61 The Times, 16 June 1956, K W Wedderburn, Cases and Materials on Labour Law, p 268.
- 62 [1960] 1 All ER 93 at 100.
- 63 Ford Motor Co, op cit at 325. Though as Selwyn has shown these publications (with the exception of Kahn-Freund's work) deal with the matter in a distinctly inadequate way. N Selwyn, Collective Agreements and the Law, op cit pp 384-7.
- 64 Ford Motor Co, op cit at 325.
- 65 As did the Industrial Relations Handbook (1961) and the Court of Inquiry into the causes and circumstances of a dispute between the parties represented on the National Joint Council for the Electricity Supply Industry (Cmd 2361, 1964).
- 66 The 1955 agreement was signed on August 23. Gayler's work was published the same year.
- 67 Ford Motor Co, op cit at 329.
- 68 Ford Motor Co, op cit at 312.
- 69 Ford Motor Co, op cit at 330.
- 70 Ford Motor Co, op cit, pp 330-331.
- 71 [1958] 1 All ER 91.
- 72 (1932) 147 LT 503.
- 73 Ibid at 514. See also Foley v Classique Coaches Ltd [1934] 2 KB 1.
- 74 [1958] 1 WLR 16.
- 75 Ibid at 20.
- 76 [1958] 1 WLR 16 at 24.

- 77 [1934] 2 KB 1.
- 78 Clause 3(a) reads as follows: '(a) [Fords] recognises the right of the employees to have an adequate number of representatives appointed on a craft, departmental or geographical basis to act on their behalf in accordance with the terms of this agreement'.
- 79 Clause 4 reads as follows: "Procedure (a) Any employee who wishes to raise any matter directly affecting his work shall first discuss it with his chargehand and/or foreman. If, in consequence of that discussion, no satisfaction results, the employee may then make a further approach to the chargehand and/or foreman accompanied by his shop steward. If there is still no satisfaction the shop steward and employee may approach the appropriate superintendent. If the matter is not resolved the superintendent shall without delay report it to the personnel manager who will then arrange for a discussion between the appropriate persons concerned."
- 80 Ford Motor Co, op cit at 330.
- 81 [1953] 1 QB 543, 552 per Denning LJ.
- 82 G H Treitel, The Law of Contract, (6th edn), p 44.
- 83 Cheshire and Fifoot, Law of Contract (6th edn), p 94 divides the cases into two classes. G H Treitel, The Law of Contract (6th edn) chp 4 does not.
- 84 R Lewis, 'The Legal Enforceability of Collective Agreements', op cit at 323.
- 85 Ford Motor Co, op cit 329.
- 86 Ford Motor Co, op cit at 325.
- 87 O Kahn-Freund, Labour and the Law, (2nd edn).
- 88 Ibid at p 67.
- 89 Labour and the Law, op cit at 53.
- 90 Labour and the Law, op cit at 128.
- 91 Labour and the Law, op cit at 130.
- 92 Labour and the Law, op cit at 60.

## CHAPTER 5

### FROM FAIR DEAL AT WORK TO THE INDUSTRIAL RELATIONS ACT

By the middle of the 1960s industrial relations reform had become a major issue. Subsequently, after the return of a Conservative government in 1970, the Industrial Relations Act became law. It is proposed to discuss these developments.

#### Fair Deal at Work

In 1968 the Conservatives published "Fair Deal at Work" which set out their intended strategy for industrial relations reform.<sup>1</sup> In stark contrast to the later Donovan proposals a major role was envisaged for law. Looking to the experience of other countries initial resistance to greater legal regulation was anticipated but it was felt that the use of law would come to be accepted. One facet of the reform strategy was a change in the legal status of collective agreements. It was recommended that s 4 should be repealed and that collective bargains be legally enforceable in the absence of an express provision to the contrary. The enactment of any statutory provision making all agreements legally enforceable would be a mistake since "It would inhibit the settlement of many day-to-day problems at local level - a process which is of vital importance to flexibility and efficiency in the factory".<sup>2</sup> It was acknowledged that initially most trade unions would seek to contract out of enforceability. However, it was believed that, in time, trade unions would see the benefits to be gained from legal enforcement and be less likely to resist its coming about.



The legalisation of collective agreements was seen as a means of restoring order to company/plant industrial relations. Indeed, provided management "... acted in accordance with agreements, management could normally depend on support from trade union officials in any just action they took against unofficial strike leaders or anyone who invited employees to act in breach of agreement."<sup>3</sup> What particular advantages were foreseen? First, "It would provide a strong incentive to both employers and trade unions to give much more careful thought than at present to the detailed contents of collective agreements, and to explain them to the people on whose behalf they had been negotiated."<sup>4</sup> Given that legal enforcement would be optional it might be reasonable to assume that parties opting for legalisation would create agreements which were clearer and more precise, etc. The possibility of litigation might also encourage dissemination of information. Whether rank and file militancy would have been stemmed by improved communications must be highly questionable. Secondly, "It would be a strong incentive, particularly to unions, to maintain much closer contact with their members, so they could step in quickly at the first sign of trouble."<sup>5</sup> The Conservative scheme envisaged some duty on unions to try and ensure their members adhered to agreements. Even where trade unions were able to perform such a task it is unlikely that they would be willing. Third, "It would encourage management and unions to reach firm agreements on the precise status and functions of shop stewards, who are so often the key figures in promoting peace or unrest".<sup>6</sup> In reality, however, shop stewards generally derive their power from the work group they represent rather than their union. Formalising the position of the shop steward would not necessarily increase management control.

Finally, "It would help to remove a major deterrent to management taking just disciplinary action against men who break agreements or incite others to do so. If a union were to give even passive support to such men, it would clearly imply that it was condoning their action. This could result in the union itself being involved in any subsequent proceedings before the Industrial Court."<sup>7</sup> Trade Union fear of being held legally responsible for the action of members would, it was felt, leave the membership isolated. It might be thought unlikely that trade unions would sign legally enforceable collective agreements, which would encumber them with legal responsibilities, that would result in their being party to a strategy that was very much aimed at increasing managerial control. Such was the optimism of "Fair Deal at Work", however, that it was proposed that unions should have a right of recovery against members, in certain circumstances, where the union had been held liable in damages for the unconstitutional actions of those members. Moreover, it was stated that the very existence of such a power "... would tend to make members think more carefully before being persuaded to disregard union authority in breaking agreements by which they were bound".<sup>8</sup>

Cases concerning collective agreements would be heard by special Labour Courts rather than the ordinary courts. These courts would also arbitrate where a collective agreement provided for this. Where a trade union was sued for breach of a collective agreement there would be a limit imposed by statute on the amount that could be awarded. A statutory provision that establishes a rebuttable presumption that collective agreements are legally enforceable is,

in itself, innocuous. In listing the advantages to be gained from legal enforcement the authors of "Fair Deal at Work" do not seem to have found anything which would be regarded as such by the union side. Legal enforcement was seen as helping to solve the problem of strikes which were both unofficial and unconstitutional. The proposals assume a unity of purpose in all this between trade union officialdom and employers. Such a unity was unlikely to be found and the trade union response was likely to be one of insisting on non legally enforceable agreements.

#### The Donovan Report

In 1965 the government established the Donovan Commission.<sup>9</sup> Its terms of reference were '... to consider relations between managements and employees and the role of trade unions and employers' associations in promoting the interests of their members and in accelerating the social and economic advance of the nation, with particular reference to the law affecting the activities of these bodies...'.<sup>10</sup>

The findings of the Donovan Commission are well known and, in particular, the identification of Britain's dual system of industrial relations: the formal system assumes that collective bargaining is a matter of reaching written agreements. The informal system consists largely in tacit arrangements and understandings, and in custom and practice. The formal and informal systems are in conflict. The informal system undermines the regulative effect of industry-wide agreements. Procedure agreements fail to cope adequately with disputes arising within factories. Nevertheless, the assumptions of the formal system

still exert a powerful influence over men's minds and prevent the informal system from developing into an effective and orderly method of regulation. Factory bargaining remains informal and fragmented, with many .... left to custom and practice.<sup>11</sup>

Donovan wished to see collective bargaining reformed and more orderly industrial relations established. As part of this strategy "... a statute, which might be called the Industrial Relations Act, should lay an obligation on companies of a certain size to register collective agreements with the Department of Employment and Productivity (DEP).<sup>12</sup> It was desired that two objectives be achieved by this. First, it was hoped that it would impress upon company boards that the primary responsibility for the conduct of industrial relations lay with them. Secondly, it was hoped that public disclosure would act as a catalyst to changes in collective bargaining and the form and content of collective agreements: it would "... draw attention to the aspects of industrial relations ... which the public interest requires should be covered wherever possible by clear and firm company and factory agreements."<sup>13</sup> This would help achieve the aim of formalising collective bargaining at company/plant level.

Donovan also recommended the establishment of an Industrial Relations Commission. One of the Commission's duties would be, on a "reference" from the DEP, to investigate and report upon cases and problems arising out of the registration of agreements. Apart from advising individual companies it was envisaged that the Commission would issue model collective agreements. The Commission's role was not seen as one of arbitrating in specific

disputes but as one of "ensuring the ... proper functioning of the machinery of collective bargaining ..." <sup>14</sup> in the long term, the view being taken that many companies would reform their industrial relations if they knew how to proceed.

A company would be liable to a financial penalty if it failed to register its agreements. On the other hand, there would be no penalty for failure to carry out the Commission's recommendations. In its work the Commission would operate under certain guidelines and one might note the following:

"Industry wide procedures and agreements should be confined to those issues which they can effectively regulate;

- (4) that wherever possible, collective agreements should be written and precise;
- (5) that pay agreements should provide intelligible and coherent pay structures;
- (6) that it is desirable for agreements whenever it is possible to link improvements in terms and conditions of employment with improvements in methods of operation;
- (7) that procedure agreements should be comprehensive in scope and should provide for the rapid and equitable settlement of disputes whether they refer to the interpretation of existing or the making of new agreements;
- (8) that it is desirable for each company or factory to be covered by a single set of comprehensive agreements applying to all the unions representing its employees; if this is unattainable, that separate sets of agreements covering distinct groups of employees should be accepted by all the unions representing workers within each group. This

principle should guide the solution to any dispute between unions concerning recognition."<sup>15</sup>

The extent of legal intervention into collective bargaining as a result of those proposals might be seen as minimal; the only sanctions mooted being in respect of registration. Nevertheless, it was being proposed that the State should direct the development of collective bargaining in a particular direction. This might have more far-reaching consequences than would be apparent at first sight, so while "written and precise" agreements might be a worthy aim per se such agreements would also be more amenable to the legal process. It was clearly hoped that, in the absence of sanctions, the IRC's stature would sway minds. The IRC would be implementing public policy and would carry added weight by virtue of its industrial relations expertise.

The Commission discussed at great length the issue of the enforcement of collective agreements. A majority believed that s 4 should be repealed: "... there would seem to be no compelling reason today why legal contracts entered into by trade unions should be placed on a different footing from other contracts as regards enforceability". However, the overall strategy was based on a reform of collective bargaining and not the imposition of legal sanctions, it being stated that "those resorting to unconstitutional action should not be threatened with any disadvantages imposed by law until new procedures have been put into operation ..."<sup>16</sup>

Those procedures should be clear, comprehensive, speedy and



effective. Once reform had taken place Donovan believed that it would "... then be possible to distinguish the cases in which unconstitutional strikes have been the result of inadequate procedures from those in which strike-proneness is due to irresponsibility or to agitation by eccentrics or subversives. Moreover, if the majority of the workers in a factory accept the procedure and have confidence in its effectiveness, those who defy the procedure may be isolated from that majority",<sup>17</sup> legal sanctions being seen as an effective deterrent to irresponsible action. The making of such a distinction would obviously involve the exercise of a value judgment.<sup>18</sup> A radical pluralist would obviously not be sympathetic to the Donovan approach. Nevertheless, Donovan believed that should it become possible to make such a distinction employers were much more likely to utilise any legal remedies available to them.

Donovan went on to outline a scheme for selective enforcement of procedure agreements. He envisaged this as possibly being used once industrial relations reform had taken place and a substantial improvement had been made in the position on unconstitutional strikes. Even if such changes took place and the imposition of a legal regime was thought desirable the Commission saw "... the use of legal enforcement machinery only as an emergency device, to be used from case to case and in exceptional situations in which it is inescapable, and that it should remain operative only for a limited period."<sup>19</sup> The process would operate by the Secretary of State applying to the Industrial Court to make an order giving legal effect to a procedure agreement. Before applying for an order the Secretary of State would have to be satisfied of five factors.



First, that the disputes procedure had been agreed between the employer and the union/unions concerned. Donovan was obviously unwilling to impose an "agreed" procedure on the parties. On the other hand, it was being assumed that once the union hierarchy had reached agreement "rank and file" dissent was no longer legitimate.

Second, the agreed procedure should provide for the "... rapid and equitable settlement of grievances in a manner consistent with the relevant collective agreements",<sup>20</sup> the only legitimate ground for a strike in breach of a procedure agreement being seen as the inadequacy of the procedure. Third, in the enterprise or establishment concerned unconstitutional strikes would have to be a serious problem. Fourthly, the employer would have to consider the situation sufficiently serious to be willing to enforce such sanctions as may be put at his disposal. The Commission were very well aware of the reluctance of employers to sue their own workforce. Finally, the threat of enforcement by legal sanctions would have to be expected to lead to a reduction in the number or in the magnitude of unconstitutional stoppages in the enterprise or establishment. While one can appreciate the reluctance to establish a scheme of sanctions which will prove to be inoperative, it is submitted that this particular proposal was somewhat flawed. If the Secretary of State declines to apply the procedures to a particular plant because he believes that the "militancy" of the workers there will mean that the law would be ignored, then respect for the scheme and for the law will be reduced and workers elsewhere will be less likely to adhere.

The members of the Donovan Commission were not entirely united in

their approach, as emerges from a number of supplementary notes attached to the main body of the Report. Two principal factors lie behind the existence of different proposals. First, a minority of members believed that the law could play a more extensive role in industrial relations. Second, one of the major issues at the time was whether, and to what extent, trade unions could "police" their membership. While some commentators have detected an underlying corporatism in the report as a whole, the minority views were clearly much more in the corporatist mould.

Let us begin by looking at the supplementary note by Lord Tangle. He recommended that where a company failed to register a plant or company agreement there should be power to impose a "disputes procedure code" on the parties. All trade unions would have to register with the IRC. The IRC would have power to de-register a trade union "... for breaches of registered agreements on the part of the union, its officers or members of such frequency or gravity as in the opinion of the IRC justified de-registration. There should be an appeal to the Industrial Court."<sup>21</sup> The extent to which trade unions would be held responsible for their members' actions was not made clear. However, only registered unions would be protected by the trade dispute immunities.

Shonfield also appended a note of reservation which favoured greater legal regulation in British industrial relations. In particular, he believed that collective agreements should be treated like other commercial contracts and would, therefore, be regarded as legally enforceable in the absence of evidence of an intention to the contrary. The fact that legal enforceability

would be treated as the norm would, Shonfield believe, encourage trade unions to accept legal enforceability. Legal enforceability would be likely to produce a number of practical benefits. First, agreements which were legally enforceable would be taken more seriously and would be more strictly observed. This, in turn, would lead to greater acceptance by trade unions of binding arbitration. It would also make it easier for managements to innovate: "... the atmosphere of uncertainty generated by the absence of precise and dependable commitments is a factor holding back the pace of British economic growth."<sup>22</sup> Greater observance would lead to employees receiving better bargains: "Their benefit would be that a wider range of management decisions would be subject to negotiation with the workpeople affected by them. Management would be induced to enlarge the scope of the collective bargain, if the reward for doing so were to allow it to plan for more rapid change in a climate of security."<sup>23</sup> Trade unions would be obliged to use their "best endeavours" to try and ensure compliance by their membership. Enforcement would be through a Labour Court rather than the ordinary Courts.

#### In Place of Strife<sup>24</sup>

The Labour Government's proposals on industrial relations reform, published in 1969, were considerably in line with the philosophy and recommendations of the Donovan Commission. Concern was shown over the problem of unofficial/unconstitutional strikes but the belief was expressed that "The best way forward will often be the negotiation of formal comprehensive and authoritative company or factory agreements."<sup>25</sup> The role of law was seen as an auxiliary one. It should also be said that the report, while in many ways

voluntarist, was somewhat pragmatic regarding what would be compatible with voluntarism.

In Place of Strife did not believe that moving towards a position whereby collective agreements were legally enforceable would improve industrial relations. Donovan's reasoning on this subject was found to be persuasive. It was, however, recommended that s 4(4) be repealed because there should be "... no legal impediment to the observance of collective agreements negotiated between employers or employers' associations and trade unions by any method freely decided upon by the two parties".<sup>26</sup> It was further recommended that collective agreements could only be legally binding where there was an express provision in the agreement.

It was believed that the State, through the medium of the Commission on Industrial Relations (CIR), could play a part in reforming collective agreements. The CIR was to have an investigatory and advisory role. One of its tasks, for example, would be to examine cases where companies or trade unions reported failure to negotiate satisfactory agreements. The CIR's recommendations were not to be reinforced by sanctions and the only sanctions the CIR would have would be to enable it to obtain information. It was felt that the existence of sanctions would damage its ability to work with trade unions and employers.

The Government also intended establishing a register of collective agreements. Initially, this was to be voluntary but it was intended that it be made compulsory at a later date. Registration would "... emphasise to managements their responsibility for the

efficient conduct of industrial relations in their undertakings, and will provide information which the D.E.P. and the C.I.R. will need ..."<sup>27</sup> It was intended that the D.E.P. would "... ascertain where improvements are most needed and where advice will be most helpful, and will take appropriate follow-up action".<sup>28</sup>

The most interventionist, and by far the most controversial, proposal was in respect of the 'conciliation pause',<sup>29</sup> the target being the unofficial/unconstitutional strike. "The method proposed would be to give the Secretary of State a discretionary reserve power to secure a "conciliation pause" in unconstitutional strikes and in strikes where, because there is no agreed procedure or for other reasons, adequate joint discussions have not taken place. The power would only be used when, if the strike (or lock-out) continued, the effects were likely to be serious". An order would only be made once conciliation had been tried and had failed. If a strike then went ahead "... the Secretary of State would, after warning the two sides, be able to issue an order requiring those involved to return to work and to desist from industrial action for a period of twenty-eight days, and at the same time requiring the employer to observe specified conditions or terms during the pause, the conditions normally being those that existed before the dispute. If either side failed to comply with this order the Industrial Board at its discretion could impose financial penalties".<sup>30</sup> It was hoped that the pause would allow a negotiated settlement to be reached. The proposal for a "conciliation pause" attracted hostile union reaction and was eventually dropped from Government plans. Strinati has argued that "The main bone of contention between the government and the

organised labour movement as represented by the T.U.C. was whether the latter would discipline its members voluntarily or whether this discipline was to be imposed by the State".<sup>31</sup>

The Industrial Relations Act was based on a view of the role of law which was radically different from the Donovan/Kahn-Freund perspective. Legal regulation and the use of legal reasoning were seen as hallmarks of an advanced society. Thus it was stated that "Once it is possible to interpret something at law, common sense interpretations and agreements are reached inside the company ... It is for those reasons that I believe we must establish a sophisticated society inside each industry with its own series of laws which are enforceable in the last analysis. That will cause people inside to act with the same reasoned logic towards each other as we are wont to use in society as citizens".<sup>32</sup>

The Act sought to encourage parties to enter into legally binding collective agreements. To that end Section thirty-four stipulated that every collective agreement made in writing after the commencement of the Act, which did not contain a provision (however expressed) stating that the agreement or part of it was intended not to be legally enforceable, should be conclusively presumed to be intended by the parties to it to be a legally enforceable contract.

The government believed that benefits would flow from legally enforceable collective bargains but, moreover, hoped that the existence of the presumption would benefit collective bargaining even where any agreement signed was not legally enforceable, the



view being expressed that s.34 would act as an "... incentive to the parties to make more precise and more written agreements.... It will help to engender more careful thinking about what ought to go into the agreement, about the effects of it, and about whether those who will have to live with it are likely to find it acceptable. We believe that this will engender a more precise and comprehensive approach to the making of an agreement, even though at the end of the day the parties finally decide to put in a contracting-out clause and it is not legally binding".<sup>33</sup> It was necessary to structure things so that one contracted-out of enforceability rather than contracted-in. If the latter position were adopted both sides of industry would be able to carry on as if legal enforcement did not exist.

What advantages were seen as flowing from a legally enforceable agreement? In the first place, clearer and more precise and comprehensive agreements were envisaged. Lack of clarity was seen as a cause of industrial strife. Second, a number of substantive benefits were predicted for both management and unions. The Prime Minister stated that an "... employer will undoubtedly be prepared to pay more with an enforceable agreement which gives him that period of time in which to plan ahead and achieve results."<sup>34</sup> Legal enforcement was a means to industrial peace though there was no requirement that legally enforceable agreements be made for a fixed term. It was also hoped that trade unions would see legal enforcement as a remedy superior to industrial action. From the point of view of management, it was felt that they needed to be able to utilise the law to achieve a more satisfactory balance of power between management and labour. "... it seems hard when one



party ... namely, the employer ... breaks the agreement he is liable to suffer loss through strikes and so on, whereas when the other party breaks or fails to observe the agreement nothing further happens."<sup>35</sup> The Conservative government was anxious to suggest that trade unions would go to law as frequently as employers, Sir Geoffrey Howe expressed the belief that "... the availability of a clear, enforceable procedure agreement with the remedies laid down will be as useful to them as the agreement will be to management".<sup>36</sup>

The Labour party were, of course, opposed to the proposals on legal enforcement. Eric Heffer then the Labour Front Bench spokesman on Industrial Relations felt that agreements which were legally enforceable would be inflexible and rigid. Second, an increase in the number of unofficial strikes was forecast (an issue to which we will return). It was also suggested that legal enforcement would make dispute resolution more difficult as it would not be possible to agree a settlement in terms which were deliberately blurred.<sup>37</sup>

One must also consider whether an agreement would necessarily be legally enforceable even where the parties contracted-in. The presumption in s 34 simply dealt with the intention of the parties. There was, therefore, nothing to prevent agreements being held to be unenforceable on other grounds. So, for example, if the wording of an agreement was felt to be sufficiently vague a court might hold the agreement to be void for uncertainty. S 4 of the 1871 Act was repealed, however, and that removed one bar to enforcement.

Where the parties wished an agreement to be legally unenforceable that agreement had to contain a contracting-out provision. While a specific provision was required stating that the agreement was intended not to be legally enforceable, the use of the term "however expressed" showed that any form of wording indicating a wish to contract-out should suffice.

S 35 of the Act dealt with presumptions applying to voluntary joint negotiating bodies (such as joint industrial councils). Subsection three enacted an irrebuttable presumption that the parties represented on the joint body "... intend to authorise it in relation to matters falling within the scope of its functions, to make decisions having effect as legally enforceable contracts made on behalf of the constituent parties". S 35(4) simply applied the s 34 presumption to such bodies.

Whatever the various advantages and disadvantages of legal enforceability, the Conservative government were, at root, concerned to reform plant bargaining and control strikes which were unconstitutional (and probably unofficial). S 36(1) provided that it was to be an unfair industrial practice for a party to break a legally enforceable collective agreement. More interestingly, s 36(2) detailed further unfair industrial practices applying to parties to collective agreements. First, s 36(2)(a) provided it was an unfair industrial practice for a trade union not to take all such steps as were practicable for the purpose of preventing anyone acting, or purporting to act, on the union's behalf from taking any action contrary to an undertaking given in the collective agreement. Second, s 36(2)(b) declared that the union was also

obliged to take all such reasonably practicable steps as would be necessary to prevent their membership from breaching such an undertaking.<sup>38</sup> Moreover, s 36(3) provided that for the purposes of sub-section two, action taken by a person other than the union who gave the undertaking shall be regarded as action taken contrary to the undertaking if it is action which, had it been taken by the union, would have been a breach of the undertaking.

Let us look at s 36(2)(a) first. This paragraph was clearly directed at a union's agents. The phrase "purporting to act" would include anyone holding themselves out as having authority, which they did not actually possess, in any particular matter. The government believed the paragraph to be valuable because its existence would make it unnecessary "... for the party alleging the unfair industrial practice to prove that the person taking the action to breach the collective agreement was in fact acting on behalf of the other party to the agreement. That would be a difficult thing for the plaintiff to prove, but quite easy for the union to prove or to rebut".<sup>39</sup>

What sorts of people would be caught by the term "purporting to act"? Would it encompass a workgroup leader calling for a strike in breach of an agreed procedure? Assuming that the individual concerned was not an agent of the union, could he be said to be purporting to act on behalf of the union? This would depend on the actual circumstances of any situation but the person concerned would, presumably, be much more likely to be regarded as an agent of the workforce. What would reasonably practicable steps amount to? If a shop steward accredited by the union called for a strike

in breach of procedure what should be done? Heaton's case may suggest that a union would have been expected to withdraw a steward's credentials.<sup>40</sup>

Given the background of unofficial/unconstitutional strikes s 36(2)(b) was of considerable significance. The government acknowledged that the law could not force large numbers of strikers to return to work if they were unwilling to do so.<sup>41</sup> By imposing an obligation on the trade union, it was obviously hoped that the union would bring sufficient pressure and influence to bear so as to ensure industrial peace. This provision produced a great deal of criticism, Eric Heffer warning that the "... unions could be transformed into policemen and disciplinary bodies. Enforceability could lead to internal conflict in the unions, creating tension, and ultimately to break-away unofficial bodies."<sup>42</sup> More unofficial strikes, not less, would have been a distinct possibility. Such a warning would have been absolutely sound. The existence of s 36(2)(b) would be a powerful deterrent to any union contemplating entering into legally enforceable collective agreements.

What would reasonable practicable steps amount to? The opposition naturally focused on a number of statements by the Conservatives, when out of office to the effect that a union would, on occasion, be expected to fine or expel members. As events transpired this provision was never actually tested in the courts and it remains open to question whether the more extreme prophecies would have been borne out.

The NIRC had exclusive jurisdiction in litigation concerning

collective agreements, s 129 providing that no other court could entertain proceedings brought by a party to a collective agreement against another party to it, where the purpose or the principal purpose of the proceedings was to obtain a decision of the court on the construction or effect of the collective agreement, or to enforce the collective agreement or claim damages for a breach of it. Adjudication was thereby removed from the ordinary courts.<sup>43</sup>

S 101 of the Act allowed any person against whom an unfair industrial practice had been taken to complain to the industrial court. Where the court found such an application well-founded it was entitled, where it considered that it would be just and equitable to do so, to grant one or more of a number of specified remedies.<sup>44</sup> Those remedies were essentially statutory equivalents of interdict, declarator and damages. It was suggested that one instance where it would not be just and equitable to grant a remedy would be where there had been an immediate walk-out in response to bad or dangerous conditions of work. The government placed great confidence in the acceptance of the philosophy of the new legal framework, it being assumed that those in the workplace would adopt the legal norms and values. Indeed, it was predicted that the most important remedy would be that of declarator.<sup>45</sup> The Lord Chancellor noted that "On the whole, when a court has laid down what the rights of parties are, most reasonable parties tend to accept that as the award, and abide by it. I should expect either an employer, or a union who were parties to an enforceable agreement, to be content with a declaration of right in the ordinary course, without perhaps pursuing their other remedies."<sup>46</sup> Those who were sceptical of the acceptance of law doubted whether

any employer would make use of the legislation, the fundamental conflict being over the alleged superiority of legal rules.

In addition to litigation over unfair industrial practices the Act provided for any party to a legally enforceable written collective agreement to make an application to the National Industrial Relations Court for a declaration with respect to any question relating to any provision of the agreement. This section allowed the parties to seek the guidance of the courts with regard to any conflict of rights. The section did not appear to give rise to any sanctions but was a further demonstration of the belief in the value of legal decision-making. S 112 was, at worst, harmless and had the potential to be useful to the parties should they desire such assistance. Where an agreement was not enforceable at law, the Industrial Court had no jurisdiction to rule as to its interpretation or effect.

The passage of the legislation on collective agreements occurred in the knowledge that the TUC had recommended to its affiliated unions that they should include a clause in every agreement negotiated, contracting-out of legal enforceability. The government was, however, of the view that with the passage of time more and more people would believe legally enforceable agreements to be advantageous.

Despite the furore aroused by the presumption in favour of legal enforceability contracting-out presented no difficulties. More genuinely contentious were ss 37-43. These sections contained a package of provisions providing for the imposition of procedures

where there was no procedure agreement or where the agreement was defective. The legislature obviously assumed that procedural deficiencies were a cause, rather than a symptom, of poor industrial relations. The government believed that such a mandatory scheme was necessary in exceptional circumstances to supplement the collective bargaining process. The government claimed that ss 37-43 "... should be seen not as the antithesis or denial of free collective bargaining, but as a means whereby collective bargaining which has degenerated into a chronic state of conflict can, by expert help, be given the chance to make a fresh start on a new and sounder basis".<sup>47</sup>

The provisions could be utilised where there was no procedure agreement, where the agreement was unsuitable for the purpose of settling disputes or grievances promptly and fairly, or where, despite the existence of an agreement, there was recourse to unconstitutional industrial action. The process commenced with an application to the NIRC by the Secretary of State, the employer, or a trade union which was either recognised by the employer or which was party to an existing agreement. Should an employer or trade union make an application, the Secretary of State was obliged to offer such advice and assistance as he considered appropriate with a view to promoting agreement with respect to the non-existent or defective procedure. The Secretary of State was entitled to invoke the assistance of the CIR. S 37(5) then required the NIRC to consider whether there were reasonable grounds for believing that the alleged procedural defects existed and, moreover, that by reason of those defects the development or maintenance of orderly industrial relations had been seriously impeded or that there had



been substantial and repeated losses of working time.<sup>48</sup> Where s 37(5) was satisfied the NIRC was under a duty to refer to the CIR the question of whether the alleged procedural defects existed and, if so, what remedy was to be recommended.

Once a reference had been made to the CIR by the NIRC the former body was under a duty to promote and assist discussions between the parties with a view to obtaining their agreement to new or revised procedures which would be formulated so as to be capable of having effect as a legally enforceable contract.<sup>49</sup> Where the CIR was satisfied that there was no need to continue with the reference, it was obliged to make a report to that effect to the NIRC which, on the application of any of the parties to the reference, had a discretion to withdraw the reference. What if the parties agreed to a procedure which was not legally enforceable? A government spokesman stated that "It would then be open to the court to say: "Does it seem that this procedure agreement is likely to fulfil the qualifications which are necessary? Is it the type of agreement the CIR would devise to meet the problems of this situation?" If they felt that it was, then I should expect that that would be accepted and that the procedure would not go any further."<sup>50</sup> This view of the legislation is questionable. The CIR could only seek to terminate proceedings under s 39(4) where satisfied that the purposes for which the reference was made would be fulfilled. The main purpose of a reference was to recommend a remedy in accordance with s 40. That section is framed in terms of procedures which "would be capable of having effect as a legally enforceable contract."<sup>51</sup> Would an agreement which was contracted-out of s 34 suffice?

Where the parties failed to reach an agreement which would permit withdrawal, s 40 of the Act came into operation. That section required the CIR to prepare a report setting out such new or revised procedures which they believed to be required and which would be capable of having effect as a legally enforceable contract. The report was then to be sent to the NIRC. Within six months either the employer or trade union involved was entitled to apply to the NIRC for a s 41 order. The NIRC had then to consider whether an order was necessary to secure acceptance and observance of the recommended procedures. Should it be necessary the NIRC had then to direct that the recommended procedure be deemed to be a legally enforceable contract between the employer and the trade union. It is important to note that the Secretary of State was not entitled to apply for a s 41 order. Once a report had been made under s 40 no fresh application under s 37 could be made for two years.<sup>52</sup> Where the parties to a s 41 order made a joint application to the NIRC to have the order varied or revoked, the NIRC was obliged to grant the application. Where only either the employer or trade union applied for the order to be revoked, the NIRC was obliged to revoke the order provided it was satisfied that the order was no longer necessary for the purpose of securing observance of the recommended procedure.

A number of features of the process contained in ss 37-41 provoke comment. First, the legislation was, to some extent, inspired by a belief that the public interest required that action be taken against the "strike problem" and there are reflections of this in ss 37-41, notably the power of the Secretary of State to initiate proceedings and the criteria in s 37(5) (eg the requirement that

there should have been substantial and repeated losses of working time). Secondly, there was a tension between a desire to force employers and unions to follow model procedures and the realisation that, ultimately, successful industrial relations were largely a matter for the parties. Thus we find that the Secretary of State could not apply for a s 41 order: "... at the end of the day it is for the parties, whether they have accepted it voluntarily or not, to enter into this relationship and to make it work. That is the reason for leaving the Secretary of State out ..."<sup>53</sup> The government also believed that the parties' agreement to a non-legally enforceable agreement would allow the NIRC to terminate the process despite the fact that the Act believed legally enforceable agreements to be superior. Thirdly, the process contained some elements that one would expect to find in auxiliary legislation. Thus, for example, we find the involvement of the Secretary of State in conciliation under s 37(4) and the involvement of the CIR. Fourthly, a legally enforceable contract imposed by s 41 would be in exactly the same position as an agreement which was legally enforceable by virtue of s 34 and, for example, the "policing" provisions of s 36 would apply. Fifthly, it is noteworthy that the process involved not one but two bodies with industrial relations expertise - the CIR and the NIRC. Why was the additional presence of the NIRC felt necessary? It may have been considered that the imposition of a legally enforceable contract should ultimately rest with a judicial body. The role of the NIRC may also represent an attempt to insulate the CIR from the "stigma" of using sanctions, so as not to prejudice its work in other fields. If the latter was the case, the legislature was being particularly naive.

The Act was predicated on a number of assumptions as to the nature and role of law. Fundamentally one must appreciate that the Conservatives assumed that people would automatically comply with duties imposed by law. Nevertheless, recourse to law was envisaged as a last, rather than a first, resort. Finally, a more interventionist legal framework was not expected to make a great deal of impact on industrial relations practice in the short term. Given time, though, it was expected that industrial relations would become much more legally orientated.

#### The Act in Practice

The provisions of the Act relating to collective agreements and the imposition of procedure agreements had very little impact.<sup>54</sup> In their report for 1972 the CIR stated that "it has been TUC policy to have an exclusion clause inserted in all new agreements and the great majority of collective agreements in companies we visited contained such provisions. In some circumstances this was the result largely of unions complying with TUC policy but this view was also held by non-TUC unions and in the majority of cases it appeared to represent a genuine distaste for the introduction of the law."<sup>55</sup> S 34 may have been contracted-out of due to opposition to the Act in general but there were also more specific reasons.

First, there was a widely-held belief that legal enforcement would not offer any practical benefits. Management did not believe that the prospect of legal sanctions would increase trade union adherence to collective bargains. Weekes et al went on to find that managers "... did not expect procedures always to be followed

and they believed the use of law could only make disputes more intractable".<sup>56</sup> There was also scepticism as to whether legal enforceability would help solve the unconstitutional/unofficial strike problem. The law was not expected to be able to subdue workgroup power, even if the trade unions were enlisted to assist.

Secondly, any trade unions who might have contemplated legal enforcement would have been deterred by s 36. Policing their own members would be a task intrinsically repugnant to most union hierarchies. In any event, it was most unlikely that workgroup power could be restrained in this way. It would also be fair to say that any attempts to do so would lead to conflict within the union and more industrial relations problems. The government, on the other hand, had believed that "while a heavy responsibility lies on employers to avoid justifiable causes of disputes, the main responsibility to ensure that constitutional procedure are not flouted on the part of members of trade unions must rest with trade unions themselves."<sup>57</sup>

Thus the CIR noted an "... almost universal use of exclusion clauses ..."<sup>58</sup> On the other hand, they came "... across some instances of legally-binding agreements. In general these appeared to have been the results of oversight but there have been a limited number of intentionally legally-binding agreements. 'One other, circumstance reached our notice where although there were no legally-enforceable agreements there had been some interest expressed by the unions in such a possibility; this arose because of an alleged propensity on the part of the employer to break agreements".<sup>59</sup>

The fact remains that the very existence of the presumption meant it could have been an important factor in collective bargaining. Enforceability (or its absence) might have been traded against other concessions. The CIR stated that whether legal enforceability achieves "... importance as a factor in the negotiations depends on whether one or other party feels strongly that it is to their advantage to have a legally-enforceable agreement."<sup>60</sup> The CIR also failed to "... find any evidence that the question had become a significant bargaining issue."<sup>61</sup>

When we move on to look at the operation of ss 37-43 we discover a very similar picture. "... the reality was that s 37 was almost totally disregarded. Only four applications were made, of which three were withdrawn, and the other was dismissed by the NIRC"<sup>62</sup> It should be said that an application would have initiated a fairly lengthy and complicated process. More fundamentally, the parties would have had to have believed that procedures backed by law represented their salvation. However, where industrial relations were so poor that the parties had been unable to negotiate a satisfactory procedure agreement, and the defects listed in s 37(5) existed, the imposition of an agreement complete with legal sanctions would have been unlikely to help. As with legal enforcement in general the solution to the problem of controlling workgroup power remained elusive. Finally, one must recall that while the Secretary of State could make an application under s 37, only the union or the employer could seek a s 41 order.

In conclusion, the Act's provisions relating to collective agreements (including procedure agreements) did not provoke change

in the use of the law. The legislature was clearly most concerned with industrial relations at plant level. However, where collective bargaining was decentralised legal enforcement would be to no avail unless other changes occurred. Thus, for example, a move to written agreements would have been required.



CHAPTER 5: FROM FAIR DEAL AT WORK TO THE INDUSTRIAL RELATIONS ACT  
FOOTNOTES

- 1 Conservative Political Centre, Fair Deal at Work (1968).
- 2 Ibid at 32.
- 3 Fair Deal at Work, op cit at 65.
- 4 Fair Deal at Work, op cit at 33.
- 5 Ibid.
- 6 Fair Deal at Work, op cit at 33.
- 7 Ibid.
- 8 Fair Deal at Work, op cit at 35.
- 9 Royal Commission on Trade Unions and Employers' Associations, op cit.
- 10 See C Crouch, The Politics of Industrial Relations, pp 65-66.
- 11 Royal Commission on Trade Unions and Employers' Associations, op cit, paras 147-149.
- 12 Royal Commission on Trade Unions and Employers' Associations, op cit, para 191.
- 13 Ibid.
- 14 Royal Commission on Trade Unions and Employer's Associations, op cit, para 201.
- 15 Royal Commission on Trade Unions and Employers' Associations, op cit, para 203.
- 16 Royal Commission on Trade Unions and Employers' Associations, op cit, para 504.
- 17 Royal Commission on Trade Unions and Employers' Associations, opct. para, 508.
- 18 And see the interesting article by H A Clegg, Otto Kahn-Freund and British Industrial Relations, in Lord Wedderburn et al: (ed), Labour Law and Industrial Relations.
- 19 Royal Commission on Trade Unions and Employers' Associations, op cit, para 511.
- 20 Royal Commission on Trade Unions and Employers' Associations, op cit, para 514.
- 21 Royal Commission on Trade Unions and Employers' Associations, op cit, Supplementary Note by Lord Tangle, p 286.

- 22 Royal Commission on Trade Unions and Employers' Associations, op cit, Note of Reservation by Mr Andrew Shonfield, p 301, para 38.
- 23 Ibid para 46.
- 24 In Place of Strife, Cmd 3888 (1969 HMSO). For an interesting account of the events subsequent to the publication of the White Paper, see P Jenkins, The Battle of Downing Street.
- 25 In Place of Strife, op cit, para 27.
- 26 In Place of Strife, op cit, para 46.
- 27 In Place of Strife, op cit, para 39.
- 28 In Place of Strife, op cit, para 41.
- 29 Two other recommendations contained in 'In Place of Strife' may also be noted. First, where a major official strike was threatened the Secretary of State would have a discretionary power to require the union or unions involved to hold a ballot on the question of strike action. The power would be used were the Secretary of State believed that the proposed strike would involve a serious threat to the economy or public interest and there is doubt whether it commands the support of those concerned (para 91). Second, the White Paper dealt with disputes over recognition between rival unions. In prescribed circumstances, the CIR would investigate and make a recommendation as to which union should be recognised. The Secretary of State would have a power to, where necessary, give effect by order to the recommendation. Both employers and unions breaching recommendations would be subject to financial penalties (paras 56-61).
- 30 In Place of Strife, op cit, para 94.
- 31 D Strinati, Capitalism, the State and Industrial Relations (London - 1982), p 158.
- 32 Per Lord Brown, Hansard Lords, Vol 319, col 80.
- 33 Per Mr R Carr, Hansard, Vol 810, col 1289 (Committee). Legislation would remove doubt as to the legal status of collective agreements.
- 34 Mr Edward Heath, Prime Minister, Hansard, Vol 808, col 1139.
- 35 Hansard Lords, Vol 319, col 105 per Lord Drumalbyn.
- 36 Hansard, Vo. 810, col 1314.
- 37 Hansard, Vol 810, col 1260.

- 38 S 36(2)(c) provides that, where one of the events listed in ss 36(2)(a) and (b) has occurred, the trade union is obliged to take all reasonably practicable steps to secure that the action is not continued and that further such action does not occur.
- 39 Hansard Lords, Vol 319, Col 191 per Lord Drumalbyn.
- 40 Heatons Transport (St Helens) Ltd v TGWU [1972] ICR 308.
- 41 Hansard, Vol 808, Col 1171 per Mr R Carr (Secretary of State for Employment).
- 42 Hansard, Vol 810, Col 1261.
- 43 S 129(2) provided that s 129(1) did not apply to any proceedings on or in consequence of, an appeal from a decision or order of the Industrial Court.
- 44 S 101(2).
- 45 Hansard Lords, Vol 319, Col 185 per Lord Chancellor (Hailsham).
- 46 Ibid.
- 47 Hansard Lords, Vol 317, Col 15 per Lord Drumalbyn. S 1(1)(b) of the Act expressed the belief that good industrial relations would be promoted by "developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes by negotiation, conciliation or arbitration, with due regard to the general interests of the community.
- 48 In Writers' Guild v BBC the NIRC expressed the view that '... this question of degree has to be assessed in the context of whether it is sufficient to justify the expenditure of public time and money which is involved in a reference to the Commission'. [1974] ICR 234, 239.
- 49 S 39(3).
- 50 Hansard Lords, Vol 319, Col 269 per Lord Windlesham.
- 51 The use of the word 'capable' may well be explained by the fact that a s40 report does not become enforceable until an order is made under s 41(2).
- 52 S 42(1).
- 53 Hansard Lords, Vol 319, Col 279 per Lord Windlesham.
- 54 Two excellent accounts of the operation of the Act are Weekes et al, *Industrial Relations and the Limits of Law*, and Thomson and Engleman, *The Industrial Relations Act: a review and analysis*.

- 55 Commission on Industrial Relations, Annual Report 1972 (Report No 37), p 22.
- 56 Weekes et al, op cit, p 223.
- 57 Hansard Lords, Vol 317, col 1345 per Lord Drumalbyn.
- 58 CIR op cit, p 23.
- 59 Ibid.
- 60 Ibid.
- 61 Ibid.
- 62 Thomson and Engleman, op cit, p 119.

## CHAPTER 6

### COLLECTIVE AGREEMENTS AND EMPLOYMENT CONTRACTS

Collective agreements will only rarely be legally enforceable between the collective parties. On the other hand, the terms and conditions of employment of many employees are derived, at least in part, from those agreements. Incorporation can occur in various ways and it is proposed to look at each of these in turn.

#### I. INCORPORATION

##### Express Incorporation

The simplest and most direct way by which collective agreements become incorporated is for the employment contract to make express reference to the agreement. Thus in NCB v Galley the contract provided, inter alia, that the employee's employment should be "regulated by such national agreement and the county wages agreement for the time being in force ...".<sup>1</sup> Thus a provision in the collective agreement "that ... deputies shall work such days or part days in each week as may reasonably be required ..." became incorporated.<sup>2</sup>

Closely related to the medium of express incorporation is the role played by the written statement required to be issued by the employer giving details of terms of employment.<sup>3</sup> The fact that the statement may, for all or any of the particulars required to be given, refer the employee to some other document means that the employee will often be referred to a collective agreement.<sup>4</sup>

The written statement has had a less than happy history. On a number of occasions the courts have equated it with the contract itself, or at least readily assumed that the terms contained in the written statement were the contractual terms. Thus in Gascol Conversions Ltd v Mercer<sup>5</sup> the Court of Appeal appeared to assume, without investigation, that the written document issued to the employee was a written contract and not a written statement. Obviously where the courts are prepared to more or less treat the written statement as the contract the terms of collective agreements will be readily incorporated given the practice of referring to them in written statements.

This tendency to over-elevate the status of written statements was seen in Hawker Siddley Power Engineering Ltd v Rump.<sup>6</sup> There a document, which was clearly a written statement, was treated as a written contract. More recently, the courts and tribunals have been more careful in distinguishing the statement from the contract. In Robertson v British Gas Corporation<sup>7</sup> the Court of Appeal approved the following statement: '... in general the status of the statutory statement is this. It provides very strong prima facie evidence of what were the terms of the contract between the parties. Nor are the statement of the terms finally conclusive: at most, they place a heavy burden on the employer to show that the actual terms of the contract are different from those which he has set out in the statutory statement'. Where an employer issues an erroneous written statement he may on occasion be estopped or personally barred from claiming that the contractual terms were different to those set out in the statement.<sup>8</sup>

Nevertheless, the written statement will often be 'compelling evidence' of the contractual terms and thereby function as a quasi-express mode of incorporation. It is also interesting to note how the issue of a statutory statement referring to a collective agreement, which conflicts with the contractual terms, might vary the contractual position. The variation of the original terms might arise if the employee continues to work after receiving a subsequent written statement and is held to have implicitly agreed to the variation recorded or is personally barred from objecting. The EAT in Jones v Associated Tunneling Co Ltd<sup>9</sup> cautioned against such variations. The Court declaring that:

If the variation relates to a matter which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g. his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where, as in the present case, the variation has no immediate practical effect the position is not the same.

Even if he does read the statement and can understand it, it would be unrealistic of the law to require him to risk a confrontation with his employer on a matter which has no immediate practical impact on the employee. For those reasons, as at present advised, we would not be inclined to imply any assent to a variation from mere failure by the employee to object to the unilateral alteration by the employer of the terms of employment contained in a statutory statement.

Again in Robertson Ackner LJ, with whose judgment Sir David Cairns agreed, stated 'if the statutory statement did not accurately set out the terms of the contract, then the employer would be in breach



of his statutory obligation, and I find it difficult to accept that a failure to comply with a statutory obligation could rebound to the benefit of an employer and create an estoppel against the employee from saying the employer got it wrong...".<sup>10</sup>

Finally, it may be noted that an Act of Parliament or subordinate legislation may cause collectively agreed terms to be incorporated.

## II. THE THIRD PARTY BENEFICIARY CONTRACT

In Scotland the doctrine of jus quaesitum tertio provides a further possible basis for the incorporation of collective terms. A number of obstacles arise. First, one must remember that as a result of s 18 TULRA most collective agreements will be unenforceable between the collective parties. Does it then follow that it would be incompetent for an employee to sue on the collective agreement? The case of Love v Amalgamated Society of Lithographic Printers<sup>11</sup> is directly in point. There the wife of an insane trade union member sued for certain benefits allegedly due to her under the contract contained in the union rules. It was objected that s 4(3)(e) of the 1871 Act was an insuperable bar to the action (s 3 of the Act rendered certain agreements of trade unions lawful which would have been adjudged unlawful at common law because of the doctrine of restraint of trade; s 4 went on to declare that such agreements were not directly enforceable in the courts). However, '... it is plain that it was not the intention of the statute to exclude the jurisdiction of a court in the case of a claim made by a third party against a trade union'.<sup>12</sup> The court went on to allow the claim on the basis of jus quaesitum tertio.

The case of Love is of interest because a third party was allowed to enforce an agreement which was unenforceable between the two contracting parties. One must, however, go on to ask why the contracting parties could not sue; the answer in this case being s 4 of the 1871 Act. On the other hand, the English Court of Appeal have held that where a collective agreement is not a legally enforceable contract there is no contract at all.<sup>13</sup> Casey has stated that: '... if it is competent to sue as a tertius on an agreement which cannot be a contract because statute has made it unenforceable, may it not be possible to sue as a tertius on an agreement which cannot be a contract because the parties have said it is not to be legally enforceable? Are not these two situations different in degree rather than in kind?'. It is strongly arguable that there is a difference in kind between having a contract on which the title to sue is restricted and having no contract at all.<sup>14</sup>

A further issue is of relevance. It has already been mentioned that the doctrine of 'intention to enter into legal relations' may not be part of Scots law.<sup>15</sup> In which case, at common law, collective agreements may well be contracts. It has also been argued that '... they are surely contracts which normally contain an implied term to the effect that neither party will enforce them against the other by legal process. It is virtually certain that the parties would utter an emphatic 'Oh, of course', if asked by an officious bystander whether they had contracted on this basis'.<sup>16</sup> At common law, therefore, there may be no obstacle to the rights of employees as tertii in collective agreements. What of the position under s.18? Hunter has further argued that the '...

phraseology is consistent both with the current view dominant in England that collective agreements are not contracts because the parties do not intend legal relations, and also with what has been suggested above as the Scots view, that they are contracts, but contracts which normally contain an implied term to the effect that neither party will enforce them by legal process. The reference to 'a legally enforceable contract' seems indeed naturally to suggest that there are such things as contracts which are legally unenforceable by the parties'.<sup>17</sup>

A number of other questions arise: 'If collective agreements were to be regarded as being necessarily in restraint of trade, to decide whether a tertius could sue upon them would be a futile exercise. It is not thought, however, that this is the law. The true position would seem to be that though some collective agreements may conceivably be in restraint of trade the majority are not.'<sup>18</sup> This statement of the effect of the doctrine of restraint of trade may be erroneous.<sup>19</sup>

If collective agreements are regarded as contracts in Scots law, even where they are not legally enforceable between the collective parties and even where they are not in restraint of trade a number of other difficulties remain in the path of the employee wishing to sue as tertius. After all, 'It is an accepted rule that to bring the doctrine into operation both contracting parties must have intended to confer on the tertius a right to sue ... it will rarely be the case - especially if a collective agreement is negotiated in London on a national basis - that both contracting parties would intend to confer on employees a right to sue as tertii in Scotland

while their English counterparts had no such right'.<sup>20</sup>

So, as the case of Love suggests, it may well be possible in theory for an employee to sue on a collective agreement which is unenforceable between the two parties. However, in practice, such an action is unlikely to succeed. One might also note that while '... collective agreements frequently impose obligations on employees, the doctrine of jus quaesitum tertio does not extend to the imposing of duties on tertii. (Though, of course, the exigibility of rights conferred may be subject to performance of potestative conditions.)'<sup>21</sup>

### III. AGENCY

It seems clear that it would be possible for the terms of a collective agreement to be incorporated into an individual employment contract on the basis that in entering into the collective bargain the trade union acted as the agent of the employee.<sup>21b</sup> It is equally clear that to offer the doctrine of agency as the rationale behind incorporation would be erroneous. The courts have not been sympathetic to arguments which treat the union as an agent for its members.<sup>21a</sup> In 1924 in the case of Holland v London Society of Compositors the plaintiff argued that an agreement between two trade unions, concerning the transferability of members '... could only be made for the benefit of individual members, for whom the union were agents'.<sup>22</sup>

Mr Justice Lush rejected this saying that the agreement '... was made by the trade unions concerned for their own purposes'.<sup>23</sup> More recently in 1977 the EAT denied that membership of a union per se created a relationship of general agency whereby the trade union

was entitled to bargain with the employer on the member's behalf.<sup>24</sup> The EAT went on to remark 'There is no reason at all why, in a particular case, union representatives should not be the agents of an employee to make a contract, or to receive a notice, or otherwise effect a binding transaction on his behalf. But that agency so to do does not stem from the mere fact that they are union representatives and that he is a member of the union; it must be supported in the particular case by the creation of some specific agency, and that can arise only if the evidence supports the conclusion that there was such an agency.'<sup>25</sup>

There are of course a number of sound reasons which explain why more use has not been made of agency principles in this context. One problem is that of contractual capacity given that a number of employees will be under the age of 18 and lack full capacity. The main problem, however, is the question of the authority of trade unions to act as agents of their members. When entering into collective agreements trade unions are normally regarded as acting as principals not agents. Of course some sections of collective agreements will be intended to govern the relationship between employer and union; others the relationship between employer and employee. It would be possible to regard the union as acting as principal in respect of the former situation and as agent in respect of the latter. This still leaves the problem of terms which are appropriate for incorporation but which the union would wish to enforce. (For example, a term governing the rights etc of shop stewards might be regarded as having both a collective and an individual aspect.) Presumably, even in respect of the same collective term, a union can be treated as simultaneously

contracting as both principal and agent. The crux of the problem of authority is less esoteric. Even if a union is regarded as having the power of a general agent to bind its members in dealings with the employer what is the position of those who have not joined the union, those who have left the union and those who join the union after the agreement is concluded? In the case of new employees they will be readily assumed to have accepted employment on the same terms as existing employees (though this does not arise through the operation of agency law).<sup>26</sup> Existing employees who join the union subsequent to the signing of an agreement could ratify it. (Indeed might not the fact of joining the union be taken as implied ratification?) The biggest difficulty lies of course, with non-members and ex-members. While collective agreements are normally regarded as applying to the whole workforce, in relation to the latter two groups this can hardly be on account of the operation of the law of agency.

The most fundamental difficulty of all flows from the presumption contained in section eighteen<sup>27</sup> (a difficulty which does not appear to have been discussed in the case-law or in academic writings). This section results in most collective agreements being legally unenforceable. 'Collective agreement' is defined to mean '... any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters mentioned in section 29(1)...'<sup>28</sup> Where a trade union acting as the agent of its members enters into an agreement with an employer will that agreement be a collective agreement? At first sight, the answer would appear to be yes; since the agreement is one made by a trade



union. On the other hand, here the trade union is acting as agent and not as principal and the wording '... made by or on behalf of one or more trade unions ...' might suggest that the definition only envisages the situation where the union is acting as principal. At the end of the day the former interpretation would seem to be much more in accord with the natural wording of the section. Therefore in any case where the union acts as the employee's agent any ensuing agreement will be legally unenforceable unless the agreement is in writing and contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract.

At common law it is the concept of intention to enter into legal relations which is relevant, not the statutory presumption. As a result the common law would seem more amenable to the incorporation of terms via the medium of agency, any search for intention would be much less likely to yield the result that arose in Ford Motor Co Ltd v AEF.<sup>29</sup> Indeed in that case the defence argued that 'The collective bargain is made with a twofold purpose. First, it incorporates clauses which it is intended from the start shall become part of the contract between the employer and the individual employee. These terms are clear and precise; they do not operate with legal force between the unions as such and the employers but they do so operate as between the employer and the individual when they are incorporated in the individual's contract of employment. Secondly, there are other terms of the collective bargain that are never intended at any stage to give rise to obligations between anybody.'<sup>30</sup>



Whatever their current relevance it is interesting to examine some of the cases involving agency. In Rookes v Barnard the judge at first instance seemed prepared to base incorporation of the 'no-strike' agreement on agency principles,<sup>31</sup> Sachs J remarking 'The representatives of AESD on that panel were authorised by their executive to bind the trade union as a whole and the members individually. The terms of the 1949 agreement thus became part of the terms of each individual contract of employment ...'.<sup>32</sup>

Lord Justice Donovan, in the Court of Appeal, was not so sure; '... if there were an issue whether the agreement was part of the terms of their individual contracts of employment more proof would be needed'.<sup>33</sup>

Agency though is perhaps most apposite where '... the number of workers involved is small, the matters in dispute are personal to them and the issues are localised to a single employer'.<sup>34</sup> An example of this sort of situation is provided by the facts of Edwards v Skyways Ltd.<sup>35</sup> There it was agreed by the trade unions and the employer that redundant pilots who chose to claim back their contributions to the pension fund rather than take up a paid-up pension later on 'would be given an ex gratia payment equivalent to the company's contribution to the pension fund'. 'It was not in dispute that the representatives of the [union] were the duly authorised agents of the plaintiff ...'.<sup>36</sup>

Arguably, in Edwards '... the judge saw the negotiated terms as a standing offer put out by the company, which the ex-pilot then accepted'.<sup>37</sup> Even if one accepts this view of the case it does not invalidate the agency approach in such cases in general. Nevertheless one can only conclude that the various legal conundra,

make the 'agency' solution inelegant, uncertain, and, in industrial terms, unreal.<sup>38</sup>

A court may on occasion be prepared to regard the union as having a certain implied authority to bind its members through the collective bargaining process. In Mordecei v Jacob Beatus Ltd the IT remarked that '... in these days such a matter as this [a flexibility agreement], which is very commonly included in agreements between management and unions, probably was within the implied authority of the union to negotiate on behalf of their membership.'<sup>39</sup> On the other hand, should an adjudicator wish not to incorporate he may borrow the language of agency to further this aim. The rigidity of the agency doctrine when applied in the industrial relations context can be played on here. A possible example of this is the case of Singh v BSC.<sup>40</sup> The tribunal noting that the respondents had failed to produce any documents '... which stated specifically either that [the union] had been appointed the sole negotiating agency for the applicant ... or that the applicant's contract of employment could be varied without his consent by agreement reached between the respondents and [the union]'.<sup>41</sup> Resignation from the union was almost being treated as a withdrawal of the union's authority as agent.

#### IV. INCORPORATION BY IMPLICATION

Incorporation can also, of course, be implied and there are a number of theories to explain the basis of implied incorporation. The most satisfactory is probably crystallised custom: 'The terms of a collective agreement are likely to be "crystallised custom" and as such automatically implied in the relevant contracts of

employment ... This rule as to custom then is in practice the way the bilateral rule-making power influences the exercise of the unilateral rule-making power of management which is in fact subordinated to it.'<sup>43</sup>

It is interesting to go on to consider the tests a custom must satisfy before incorporation can take place. In theory a custom must be reasonable, certain and notorious.<sup>44</sup> There are two notable features of the test. It places a high degree of discretion into the hands of the adjudicator while, at the same time, proving highly deficient as a tool of analysis. The criterion of reasonableness obviously gives the adjudicator a large measure of discretion. The remaining criteria of notoriety and certainty render the test a rather rigid one and mean that, if used in practice, it would often be rather difficult to satisfy. These criteria then would often have to be interpreted very liberally if a custom were to be incorporated - the corollary is that the adjudicator is granted further discretion.

In the second place, the test is of limited value as a tool of analysis. A court considering the question of incorporation is often confronted with distinctly complicated situations. The question which must be asked is how helpful are the criteria in providing solutions. An excellent illustration of the difficulties that can arise is provided by the situation where there are competing collective agreements. While there are no doctrinal difficulties involved merely in the fact that contractual terms are derived from more than one collective agreement problems arise where their terms are inconsistent. Thus in Loman v

Merseyside Transport Services the question arose as to whether the working week was 68 hours (as stipulated in a local agreement) or 41 hours (as had been agreed in an earlier national agreement).<sup>45</sup> If one decides that the national agreement is *prima facie* capable of satisfying the common law tests how do you cope with the additional local agreement? One possibility is that the national agreement is incorporated on the basis that the custom is that it is over-ridden by local agreements to the extent that they suggest terms to the contrary. Such a suggestion would allow both agreements to be incorporated. A local agreement may be incorporated by virtue of satisfying the same criteria as a national agreements. Alternatively, the courts may regard it as works custom: There the theoretical basis for incorporation is less rigorous.<sup>46</sup> (On the other hand, there may in certain cases exist a judicial bias against giving normative effect to local collective agreements - see p 189 below.)

In any event, should the local agreement be acted on it might prevail after a period of time; even where the national agreement is incorporated variation by conduct can still, of course, take place. Ultimately, where two inconsistent agreements exist which can be regarded as having been intended to have normative import the adjudicator can realistically be considered to have a complete discretion to select for incorporation whichever one he chooses. Alternatively, he could incorporate both agreements on the basis that where conflict arose one would prevail. In the former situation he simply adopts the agreement which is more reasonable. In the latter, he re-writes the agreement.

It is worthy of mention that the court in Sager while laying down the test of 'reasonableness, certainty and notoriety' also acknowledged that it would be easier to incorporate works customs.<sup>46</sup> '... If ... the practice was imported into the respondent's contract of employment, the respondent cannot escape from its operation by showing that it lacks some of the essentials of a valid custom or usage of trade ...'.<sup>46a</sup> One ground for the term being incorporated was that there was a '... practice of making reasonable deductions for bad work ...[which had]... continuously prevailed at the defendant's mill from upwards of thirty years, and that during the whole of that time all weavers employed by the defendants have been treated alike in that respect.<sup>46b</sup>

The foregoing discussion would indicate that even if an adjudicator were to employ the traditional test it would often be of little use. One might suggest that the evocation of crystallised custom offers a convenient veil behind which one can hide the automatic incorporation of the collective bargain. This explains the attraction of crystallised custom but at the same time reveals its limitations as a tool of analysis of potential sources of contractual terms. It is also noteworthy that Kahn-Freund does not appear to have ever addressed the concept of crystallised custom at any length. He seems to have been content to have found a device to bridge the gap between collective decision-making and individual obligations.

The limitations of the common law test are again revealed when one considers the variation of collective agreements. In MacLea v

Essex it was held that there was '... an agreement to employ the plaintiff on the terms and conditions of the National Maritime Board as they were from time to time revised ...' such an engagement being found to be one '... perfectly familiar to people in the shipping industry'.<sup>47</sup> The main evidence in MacLea amounting to mere assertions of this familiarity by two witnesses from the shipping industry. In general, however, evidence of knowledge that such a custom exists may be hard to obtain. While management and labour may well look to the results of collective bargaining as a source of contractual terms neither side is likely to have given the matter any precise thought. The longer the collective bargaining process has been in operation the more likely it is that variations will automatically be incorporated. In industries where the practice is less than long standing the question will be more speculative. In such industries one might doubt whether the knowledge of the parties would permit any custom to be refined beyond the level of saying that there is an expectation that the terms of the individual contracts will be provided by collective bargaining.

Where the custom is along the lines of MacLea one might also wonder whether there might not be scope for refusing to incorporate on the basis of reasonableness. After all, in the MacLea situation is there any limit to the alteration to an individual's position that could occur as a result of an alteration of a collective agreement?

In practice, however, '... the industrial tribunals and the courts simply do not apply to collective agreements the sorts of tests that the general principles of the law of contract impose as the

criteria for binding customs, and if they did, these rather exacting requirements would be unlikely to be met in any given case'.<sup>48</sup> As we have seen, even if they were, it is doubtful how helpful those tests would be. The position in practice then is that the collectively agreed terms are normally automatically incorporated.

For the adherents of the 'crystallised custom' theory possibly the real test of incorporation is to ask whether the collective agreement was followed in practice. In the words of Kahn-Freund 'Agreements are generally acted upon, and this may be assumed, but not necessarily. If either party can show that an agreement (without having been formally abrogated) was widely ignored, its terms may not qualify as custom or usage. On the other hand, they may do so, even if the agreement is of recent origin and intended to innovate rather than to codify provided the terms are generally observed.'<sup>50</sup> Earlier in "Legal Framework" Kahn-Freund had written that "it does not ... matter whether the worker is a member of a union party to the agreement or whether the employer is or has at any time been a member of a "contracting association". What does matter is whether the terms of the agreement are in fact applied in the industry and district. The Wages Scales and other "Codes" it contains can easily become "crystallised" custom".<sup>50a</sup>

Recently the Court of Appeal had regard to the behaviour of the parties subsequent to the commencement of the contract when determining the terms of the contract.

In a stimulating note on Burroughs Machines Ltd v Timmone<sup>51</sup> Freedland discusses what he believes to be the value in having



regard to the '... practice of the contracting parties'.<sup>52</sup> The case concerned the resignation of a company from an employers' federation whose collective agreements the company had followed. What effect did the resignation have on the importation of these terms? Freedland argues that the key question was "... whether the parties continued to derive individual norms from that collective agreement. There was some evidence to suggest that the parties had continued to regard both the guaranteed week agreement and the industrial action escape clause as operative. If that was a true view of the evidence, the guaranteed week proviso should have been regarded as still incorporated ...".<sup>53</sup> Certainly in Turiff Construction Ltd v Bryant the Court placed weight on whether a local agreement had been put into operation.<sup>53a</sup> At any rate the deployment of any doctrine based on custom/usage is ultimately predicated on the existence of past practice. The theory flounders when faced with the emergence of collective bargaining in an industry or in a section of an industry.

While collectively agreed terms may be incorporated on the basis of custom it is suggested that less commonly, they may be implied by using one of the judicial tests for implied terms in fact.<sup>54</sup> Thus in Robertson v British Gas Lord Justice Kerr remarked that the contractual documents '... proceed on the basis that there will be an incentive bonus and that its amount and the terms governing it are to be found in an agreed collective scheme in force from time to time'.<sup>55</sup> Moreover '... although it looks from the documents as though the incentive bonus scheme is merely one small part of the total terms of the individual contracts of employment, it provides in fact an integrated and general framework for a very large number

of the mutual rights and obligations of the parties. Indeed, it becomes virtually impossible to determine what the full terms of those individual contracts of employment are if you once take away the agreed collective scheme for an incentive bonus as an integral part of these contracts'.<sup>56</sup> This is not to say that the mode of implication was other than crystallised custom in Robertson itself but merely to suggest that in some instances the deployment of tests such as the 'officious bystander' may lead to incorporation. Indeed the case suggests that where the employment contract is partially in writing its structure may invite incorporation.

#### Competing Collective Agreements

One of the problems associated with incorporation is that posed by the situation where the terms of the employment contract are clearly derived from collective bargaining but it is unclear which agreement one looks to. A good example of the problems involved is shown by Loman v Merseyside Transport Services Ltd, a case concerning redundancy, where the question which arose was whether the working week was 68 hours or merely 41.<sup>57</sup> A national agreement provided for guaranteed weekly remuneration for road haulage workers on the basis of a 41 hour week. A subsequent local agreement made between the employer and trade union officials provided for payment on the basis of a 68 hour week. The employers argued that the local agreement was not intended to have contractual effect so as to compel any employee to abide by it and that it was in the nature of a 'gentleman's agreement'. This argument proved successful, the tribunal holding that applications for redundancy payments on the basis of a 68 hour week failed because the local agreement was not contractually binding.

Despite the fact that the managing director of the company had stated categorically in evidence that the national agreement '... was modified by the 1963 agreement. The company could insist on the 68 hours work'.<sup>58</sup> On the other hand, a former manager of the company gave evidence and stated: 'The agreement was not intended to have contractual effect so as to compel any employee to abide by it. It was in the nature of a gentleman's agreement for ironing out local difficulties and for providing an incentive for co-operation with the mechanics of operation the employer wished to adopt.'<sup>59</sup> Nevertheless the High Court upheld the tribunal. Lord Parker in delivering the judgment of the Court justified the dubious conclusion reached by saying that 'If locally legally binding agreements were made departing from the National Agreements, it would undoubtedly create demands for a complete overhaul of the National Agreement.'<sup>60</sup>

The decision can be criticised for a number of reasons. In the first place, Plant Agreements which might lead to demands for the 'complete overhaul of national agreements are commonplace in many industries and it is a novel view that this is a reason for refusing them any legal effect. Indeed, such an approach may be said to run counter to the recommendations of the Donovan Report for an extension of plant and local bargaining'.<sup>61</sup> Secondly, '... the issue before the court must not be confused with the entirely different question whether a collective agreement is intended to be legally binding at collective level ... The question here was whether the 1963 agreement was intended to have effect as part of the employees' individual contracts.'<sup>62</sup>

Several years later the 'Loman situation' arose again and this time the task of offering a solution fell to the Court of Appeal. In Gascol Conversions Ltd v Mercer the question arose as to the normal working hours of an applicant for redundancy - were his hours to be governed by a national agreement or by a subsequent local agreement.<sup>63</sup> The court held that '... the local agreement should [not] be regarded as varying the national agreement'.<sup>64</sup> The court placed some weight on the fact that at the end of the local agreement were the words: 'The parties intend that any agreements contained in these notes should be binding in honour only and that they should not give rise to any legal obligation.'<sup>65</sup> Moreover, they noted that "... the national agreement contains an express provision that 'where the agreement is at variance with other national and local working agreements, it is to take precedence'".<sup>66</sup> A number of points can be made about this decision. Firstly, the Court of Appeal appears to have perpetuated the confusion which arose in Loman as to the separate issues of legal status between the collective parties and any decision to incorporate the terms of a collective bargain into the individual contract. Secondly, the Court placed store on the 'preference' clause in the national agreement; this begs the very question at stake. Until the Court has ascertained which collective agreement is to govern the relationship such clauses are obviously irrelevant. It is also of interest to note that in choosing to give normative effect to the national bargain the Court made no mention of the various techniques for incorporation. Finally, by looking to the formal system of collective bargaining the court declined to give normative effect to the working

practices of the industry. Were there any policy reasons for the rather illogical attraction to the preference clause in the national agreement? Possibly it stems from judicial distaste for lack of order in industrial relations which then finds expression in preferential treatment of the rules emanating from the formal institutions. After all in Turiff Construction Ltd v Bryant a local site agreement was regarded as being on the basis '... of co-operation and not as a matter of contract'.<sup>67</sup>

An interesting recent case is that of Donelan v Kerrby Construction Ltd<sup>68</sup> This again concerned a redundancy payment and the question arose whether a site bonus should be included in the week's pay for the purpose of calculating redundancy. The applicant was an employee of a plant-hire company and latterly was working on a construction site. On that site the main contractor had an agreement with the AUEW, the union to which the employee belonged, that the site bonus would be paid to everyone working on the site: the employers were sub-contractors and not parties to that agreement. The employers paid the site bonus and recovered the amounts paid from the main contractors. The EAT held that 'The obvious term to imply in such a case is that so long as a site bonus is payable by the main contractor the sub-contractor will pay his employee the amount of the site bonus appropriate to that employee.'<sup>69</sup> This decision has led one commentator to conclude that '... this is not untypical of the recent decisions of the EAT in which there is quite a tendency to hold that the contract of employment must be so construed as to embody the firm reasonable de facto expectations of the employee, and a further tendency to treat the result of collective bargaining as the prima facie guide to

those firm and reasonable expectations.<sup>70</sup>

To what extent does the decision place weight on the collective bargaining process? At first glance the EAT appeared to take a much broader view of the situation than the IT who had felt that since the sub-contractor was not a party to the relevant collective bargain he was not under a duty to observe its terms. On the other hand, what would have happened if the main contractor had decided to stop paying the site bonus? The EAT upheld the IT's view that if that happened there could be no possible claim by the employee against his employers for the amount of the site bonus.<sup>71</sup> But what would the position be if the main contractor had stopped paying in breach of the collective agreement? If the employer is not obliged to pay in that situation you are giving very little normative import to the collective bargain. Indeed even if the collective is terminated by mutual agreement between the parties why should it be assumed that the employees necessarily lose the right to the site bonus. (See below, p 209.)

To what extent does the approach in Donelan reveal a different approach to that in Loman and Gascol? Davies and Freedland regard the former two cases as being evidence of a judicial distinction between voluntary and obligatory arrangements.<sup>72</sup> A distinction which they believe to have been developed by the Courts in relation to collective agreements and particularly to agreements for overtime work. '... the courts tend to treat only centralised and formal bargaining as creating such obligations. They tend to rationalise more localised and informal bargaining as a mere exchange of assurance of goodwill between employers and



employees.'<sup>73</sup> On this basis Freedland believes that had the Divisional Court in 1968 or the Court of Appeal in the mid-70's been faced with the facts that arose in Donelan 'They would have been most likely to have taken a narrower approach to the contract of employment, and to have held that the sub-contractor was paying the site bonus either simply as a matter of choice and convenience, or at best as agent for the head contractor, but not under a contractual obligation to his own employees.'<sup>74</sup>

On this basis Donelan may well represent a new departure. On the other hand, the fact situation in Donelan was materially different to either Gascol or Loman, in the latter two cases the adjudicator was faced with competing collective agreements offering inconsistent terms. In Donelon the Court did not discuss the matter in terms of incorporation of collective terms. Rather the discussion was really about implied terms in general and not any specialities relating to incorporation from collective agreements. The courts may be less likely to regard local agreements as being voluntary but there is no guarantee as to how the Courts would jump if faced with conflicting national and local agreements.<sup>75</sup>

The easiest solution to the problem is demonstrated by Barrett v NCB.<sup>76</sup> There the contract of employment expressly incorporated the collective agreement. Clause 3 of the agreement provided that the Union through its area or local representatives could enter into arrangements with the employer to provide for, inter alia, regular working of additional shifts.



### Appropriateness of Terms of Incorporation

It is, of course, the case that where an employee's contractual rights and duties emanate from a collective agreement not all the terms of the collective contract will be incorporated. The question of appropriateness of terms for incorporation has posed a number of problems.<sup>77</sup>

One problem is caused when it is necessary to decide which terms are present to regulate the relations between the collective parties. Camden Exhibition and Display Ltd v Lynott is a case in point.<sup>78</sup> There a rule of the working rule agreement provided that 'overtime required to ensure the due and proper performance of contracts shall not be subject to restriction, but may be worked by mutual agreement and direct arrangement between the employer and the operatives concerned'.<sup>79</sup> It was not disputed that, in general, the terms of employment were derived from the agreement but was the rule quoted above appropriate for inclusion? Lord Denning stated that 'I think it is clear that the unions agreed that when overtime was necessary to ensure the proper performance of contracts, the unions would not impose a restriction on overtime, and would not authorise their stewards, or anyone on their behalf, to impose a restriction on overtime'.<sup>80</sup> The more interesting question remained to be answered. Lord Denning was of the view that the agreement imposed an individual obligation and found that '... this working rule means that the men will not, officially or unofficially, impose a collective embargo on overtime when it is required to ensure the due and proper performance of contracts.'. <sup>81</sup>

A number of criticisms of this interpretation can be made. Even

if the clause is to have an individual counterpart, the element of '... mutual agreement and direct arrangement ...' does not disappear and overtime for the individual employee must presumably be voluntary. Moreover, if it was voluntary on both sides one or more employees would be entitled to refuse to do it. How then does one distinguish a collective embargo from a number of individual refusals? It is respectfully submitted that it is difficult to regard the interpretation as being other than artificial and unfeasible in operation.

The decision in Camden Exhibitions Ltd to extend an obligation between collective parties so as to have normative effect at the individual level can be regarded as a failure to appreciate that the function of collective agreements is not only to regulate the individual employment relationship but also to regulate the relations of management and union. In the words of Kahn-Freund 'This view of the dual effect of collective agreements is now widely accepted. It is generally accepted in most continental countries but surprisingly this elementary distinction is still sometimes ignored by English courts ...'.<sup>82</sup> On the other hand it has been objected that '[W]hen the issue at both 'levels' concerns the form, content, enforcement and interpretation of the same collective agreement, it is hardly surprising that the Courts occasionally forget to invoke the aid of this artificial conception and arrive at the wrong result.'<sup>83</sup>

Davies and Freedland take the view that 'whereas the normative parts of collective agreements are usually capable of incorporation into individual contracts, the procedural parts are in principle

collective in nature and incapable of incorporation into individual contracts unless the court undertakes deliberately to devise an individual version of the collective obligation'.<sup>84</sup> In testing the validity of this proposition it will be helpful to look at the experience of the CAC and the Industrial Court who have both been faced with the question of incorporation.

In their administration of s 8 of the Terms and Conditions of Employment Act 1959 and ss 11-16 of the Employment Protection Act 1975 the aforementioned bodies were confronted with the issue of incorporation. Understandably both bodies took the view that it would be wrong '... to impose recognition of a particular union as an obligation, on an employer in a contract of employment'.<sup>85</sup>

It might be thought that the question of incorporation of procedural clauses would depend very much on the nature of the clause in question. In Award No 3059 it was stated that a collective disputes procedure was not suitable for incorporation. Similarly in Award 3225 the court did not '... consider that provisions ... whereby disputes are to be dealt with in accordance with the constitution of the NJC are properly to be regarded as terms or conditions of employment ...'.<sup>86</sup>

Nevertheless some procedural clauses were held to have relevance at the individual level and clauses which resembled an individual grievance procedure would be likely to be of a type appropriate for incorporation. In Award 3227 it was held that the recognised terms and conditions included provision for hearing of grading appeals by a Provisional Council and by the NJC. Moreover the

employer was not observing the recognised terms and conditions by not implementing a particular grading award. Redundancy procedures which are more than simple negotiating procedure may well be suitable for incorporation. Thus in Award 3225 a procedure was regarded as suitable for incorporation whereby the question of who was to be declared redundant was to be determined after consultation with the employee representatives and that regard was to be paid to the general principle of 'first in, last out'. A similar view would be taken of disciplinary and dismissal procedures. So '... what is truly a term or condition of employment ... [does not cease] ... to be properly so described because it lays down procedures or 'machinery' for determining an employee's rights in relation to the term or condition'.<sup>87</sup> In 3225 an agreement which provided that '... the employer's regulations shall not be altered without prior consultation with the British Air Line Pilots Association ...'<sup>88</sup> was regarded as a term or condition of employment. A related issue arises in connection with individual representation. In Award 3059 the Industrial Court did not regard a collectively agreed term concerning the appointment and function of shop stewards as a term and condition of employment.

The study of Industrial Court/CAC awards reveals that individual grievance procedure will be appropriate for incorporation. It is often less than easy to adjudge a procedure as being individual rather than collective.

Union representatives, particularly shop stewards, often provide substantial assistance to individual employees over workplace

affairs; the rights of such representatives often flowing from collective agreements. Would an individual counterpart of such a right be incorporated into the employment contract? Should the right be regarded as belonging solely to the collective sphere? It is instructive to examine a number of cases which arose under section five of the Industrial Relations Act.

A number of cases arose concerning individuals who alleged that they were suffering unjustifiable discrimination because another union was being more favourably treated by the employer than their own. In CEGB v Coleman it was held that the fact that only members of the recognised union were eligible for election to the works committee did not amount to discrimination (within the terms of s 5) against members of another union.<sup>89</sup> The NIRC holding that the sub-section contemplated discrimination by an employer against a worker as an individual in the context of his contract of employment, rather than discrimination between different groups of workers. Quite consistently the court went on to say that '... shop stewards and other local union representatives will be accorded the facilities usually accorded to holders of their offices, ... [these] are benefits which are enjoyed by the worker qua union representative and not qua individual'.<sup>90</sup> The court's view as to what was an individual matter and what was collective flowing from their understanding of the structure of the Act. As Kidner saw it: '... while the statute protected the employee's rights as an individual, it would do nothing to harm the collective bargaining procedures either agreed to voluntarily or set up under Part III of the Act'.<sup>91</sup> The House of Lords took a different approach and held in Post Office v Crouch that to deny a non-

recognised union organisational facilities was to breach the duty imposed by section 5, Lord Reid declaring that '... discrimination against a man's trade union generally affects him personally'.<sup>93</sup> Their Lordships, therefore, placed the emphasis on the Act's aim of protecting individuals as opposed to the promotion of collective bargaining.

Howle v GEC Power Engineering Ltd is also of relevance.<sup>94</sup> There it was stated that '... to have two sets of grievance procedure, one which allows an employee to be represented by his union and the other which does not, is on the face of it to discriminate unfairly against those denied union representation ... Under their procedure the employers deny this advantage to all members of UKAPE. What value will attach to the right given to the employee to join a union of his choice if that union is denied the right to speak on his behalf'?<sup>95</sup> The NIRC rejected the view that the employee had no genuine individual grievance and that his application for a salary review was merely a manoeuvre to secure bargaining rights for UKAPE. 'The tribunal has fallen into the error of equating negotiating rights with the right to represent and negotiate on behalf of a member in an individual grievance. They are quite separate functions.'<sup>96</sup> Nevertheless the collective and individual spheres overlap; what of the situation where a group of employees wish to process claims? A further difficult situation was pointed to by Craig:<sup>97</sup> "This would be where the employee, represented as having an individual grievance, is one of a large number of employees who are either on the same terms and conditions of employment, or amongst whom there is a strict wage differential. The employer may then be placed in a dilemma; under the principle



propounded in the Howle case, the employer must concede representation concerning such an individual grievance, even though this may have automatic repercussions in respect of other employees either because the determination of the individual claim necessarily affects a group of employees on the same terms and conditions, or by prompting strong claims by others to an analogous hearing in order to preserve the differential. Once again the question would arise as to whether the claim was really in respect of an individual grievance, with similar difficulties; if there are two other employees with the same wage structure as the person seeking to be heard does this prevent it being an individual grievance, merely by the necessary effect it will have on their wage structures too? If the answer is in the negative would it make any difference if the number were ten or fifty?"<sup>98</sup>

The question which remains is what should be the employee's right to representation. A question which evidently has perplexed the CAC. In Award 78/399 it was felt that an obligation whereby an employee was entitled to be represented by a shop steward with general representational rights could not be '... considered part of the "terms and conditions of employment" as that phrase is normally construed'.<sup>99</sup> However, in Award 78/629 representation by stewards was regarded as a matter of individual rights. Moreover, in Award 77/27 the committee awarded that '... members of ASTMS shall have the right to be represented by ASTMS in individual matters of discipline or grievance which have not been resolved within stages 1 and 2 of the Company's grievance procedure'.<sup>100</sup>

When a shop steward is denied facilities which he is entitled to



under a collective agreement should an employee within his constituency be able to sue? The source of the present difficulty is that such a matter straddles both the collective and the individual spheres. Arguably such general organisational rights are primarily collective matters. In such a case to allow an employee to sue might be thought to circumvent the statutory presumption contained in s 18 TULRA 1974. This can be contrasted with the position where a grievance procedure grants an individual the right to be represented by a shop steward. There the greater element of individual right in the clause would point in favour of incorporation. As Doyle has argued: 'The right of an individual employee to union representation in grievance and disciplinary procedures is often contractual in nature and clearly capable of individuation'.<sup>1</sup> The artificiality of such distinctions cannot be denied. For example, the denial of facilities to stewards may well restrict their ability to pursue individual grievances. Ultimately, however, this artificiality can but be accepted.

The case of City and Hackney Health Authority v NUPE is of interest.<sup>2</sup> There a provision of the Whitley Council agreement for hospital ancillary staff provided that 'full-time union officers shall be permitted to visit the workplace in the performance of their trade union duties and for the purpose of seeing that the council's agreements are observed ...'.<sup>3</sup> Lord Justice Oliver stated that '... there is at least an arguable case for saying that the existence and maintenance of trade union facilities at a hospital is a condition of service which can be treated as incorporated ...'.<sup>4</sup> However, in deciding what was the precise nature of the individual contractual right it is pertinent to

inquire whether an employee who was a shop steward would have any more extensive rights than an ordinary employee? For example, would a shop steward have a contractual right to enter the employer's premises to carry out his trade union duties? The Court of Appeal appeared reluctant to countenance the holding of more extensive rights by shop stewards. It being argued by the employer that '... the only provisions which could give rise to any contractual rights are those which are clear and affect the position of an employee as an employee and not as a trade union representative'.<sup>5</sup> Lord Justice Oliver remarking that '... I think there may be something in that, although I do not think the contrary is totally unarguable'.<sup>6</sup>

#### Collective Disputes Procedures

In the recent case of Todd v Daily Telegraph the High Court refused to incorporate a disputes procedure which '... dealt with the relationship between the union and ... [the employer] ... which was outside the ambit of the employer/employee relationship, and therefore inappropriate for incorporation in ... [the] ... individual contract of employment. Moreover, there was a separate clause ... dealing specifically with dismissal.'<sup>7</sup>

Again in NCB v NUM the distinction was drawn between '... terms of a collective agreement which are of their nature apt to become enforceable terms of an individual's contract of employment and terms which are of their nature inapt to become enforceable by individuals. Terms of collective agreements fixing rates of pay, or hours of work, would obviously fall into the first category. Terms which deal with the procedure to be followed by an employer

before dismissing an employee also would fall into the first category. But conciliation agreements setting up machinery designed to resolve by discussions between employers' representatives and union representatives, or by arbitral proceedings, questions arising within the industry fall in the second category.'<sup>8</sup> Scott J went on to state that 'A collective agreement between an employer and a union providing machinery for collective bargaining and for resolving industrial disputes may be of very great importance to each and every worker in the industry. But it is not likely to be an agreement intended to be legally enforceable as between employer and union, and it is almost inconceivable to my mind that it could have been intended to become legally enforceable at the suit of an individual worker. In the procedures laid down by the 1946 Scheme, for instance no part is played by any individual mineworker. The machinery is designed to be invoked and operated either by the NCB or by the NUM with the co-operation of the other. It simply does not lend itself at all to enforceability at the suit of an individual mineworker.'<sup>9</sup> The identification of collective disputes procedures is made a trifle difficult by certain characteristics of the British industrial relations system. In particular by the preference for general procedures: 'Procedures are multi-purpose. Such distinctions as that between a "judicial" approach to a dismissal and the approach to an economic dispute "are rarely made either in the main procedure agreements between the parties or in subsidiary agreements at lower levels. The tendency is to regard procedures as all-purpose agreements to be used flexibly as particular situations arise and as common sense seems to dictate".'<sup>10</sup> Thus in Tadd the procedure concerned was used to handle both 'industrial

disputes' and individual disputes. Indeed, the instant dispute was arguably '... a mixed case where industrial issues were involved as well as an individual claim'.<sup>11</sup> By examining different procedures contained in collective agreements might it be possible to identify discrete types?

(a) General Procedures

Such procedures might be regarded as the archetypal collective procedure and, therefore, not suitable for incorporation. While such procedures are able to, and do, process individual grievances they are framed purely in terms of collective parties and no mention is made of the individual employee. The manifestly collective nature of such provisions is reinforced when the same agreement contains, in addition, a disciplinary/dismissal procedure. When a procedural agreement lists its functions this can help denote its purely collective nature. For example '... the committees ... will not negotiate ... on discipline, redundancy or voluntary severance principles'.

(b) Combined Procedures

Some procedures make it clear that they are to cover both group disputes and individual disputes. An agreement might state that it is to apply to "... all disputes and grievances concerning an employee, or group of employees". Indeed it may continue 'Any issue shall be raised first by the employee directly concerned with his supervisor, who shall attempt to settle it'. The collective nature of the procedure is emphasised in various ways; for example, it may contain a

status quo clause. Is there scope for individuation, to a greater or lesser extent, of such procedures? While '[I]n linguistic terms any collective obligation is capable of individuation, over-readiness to do so is likely to lead to the perpetration of the sort of errors seen in Camden. One might take the view that where a grievance procedure is primarily collective no individuation should take place.'<sup>12</sup> Such an approach may well be too restrictive. Arguably, for example, an employee should have a contractual right to union representation. On occasion, where a procedure has a number of stages the procedure will commence at a later stage where an issue concerns a group of employees. In such a case it may be easier to hold that individual rights/obligations exist in the earlier stages.

An added difficulty is posed by agreements which contain both a 'combined procedure' and a separate disciplinary procedure. The disciplinary procedure may in certain circumstances be integrated with the combined procedure: for example, 'the Appeal Procedure shall follow normal disputes Procedures described in item 4.00 but beginning at stage 3'. Integration might invoke a greater degree of individuation. Indeed the Industrial Relations Code of Practice states that 'individual grievances and collective disputes are often dealt with through the same procedure. Where there are separate procedures they should be linked so that an issue can, if necessary, pass from one to the other, since a grievance may develop into a dispute.'<sup>13</sup>

(c) Disciplinary/Dismissal Procedures

Such procedures are a clear source of individual rights and duties. An example of the type of clause in question is provided by the case of Murray v British Rail (though whether in that case the source of the clause was a collective agreement is not clear from the report).<sup>14</sup> There 'the contract provided for the domestic disciplinary procedure, he was a party to the contract, and it was his job to participate in it and see that it operated properly'.<sup>15</sup>

Similarly the nature of grievance procedures might suggest that they should be incorporated. A collective agreement may contain both individual and collective grievance procedures, in such a case it would seem plain that the individual procedure will be suitable for incorporation.

Difficult questions are posed by the actual individual rights/duties which flow from such procedural agreements. While it may be easy to infer that a reference in an agreement to an individual's right to representation by a steward should be contractual more fundamental problems exist. What, if any, are the duties which should lie on the individual? One obvious possibility is that a collective term should be held to imply that an individual should not take part in a strike before he has exhausted procedure. S 18(4) would prevent the incorporation of such an obligation; moreover, it would prevent the incorporation of '... any term from which such an obligation was inferred'. What if a collective agreement provided that adherence to procedure would entitle employees to a bonus payment? Another possibility

emerges from Baron v Sunderland Corporation (see below).<sup>16</sup>

The difficulties suggested by the preceding paragraph might be a barrier to incorporation. The position is likely to be eased where one is dealing with individual procedures in collective bargains. Such procedures are arguably intended for individuation and this intention might be thought to overwhelm doubts as to the precise content of the individual obligation. Thus Wedderburn & Davies comment that 'where ... [collectively agreed] ... terms set up a procedure to be followed in individual dismissals there would seem to be little reason for denying them incorporation into individual employment contracts'.<sup>17</sup> The question then becomes one of translation, subject to any statutory provisions such as s 18(4).

The distinction between procedural and substantive clauses is an important one. It can, however, be too readily assumed that procedural clauses are not capable of individuation. The question of incorporation turns very much on a scrutiny of the clause in question. Baron v Sunderland Corporation furnishes an interesting example of the issues that can arise.<sup>18</sup> The question arose whether a provision in the relevant collective agreement relating to arbitration was incorporated into the individual contract of employment and whether it constituted a valid submission to arbitration. The provision established a joint committee of reference who were to determine "any questions relating to ... interpretation ...".<sup>19</sup> On the facts, it was held that the clause was in any event not an arbitration clause: the court pointing out that it was an essential ingredient of an arbitration clause that



it conferred bilateral rights of reference of any dispute arising between the parties to an independent arbitrator. It might however, be thought that this type of clause could impose obligations at both the collective and individual levels. The employee in dispute would be obliged to exhaust the grievance procedure before resorting to other remedies, for example, raising a court action. In the instant case the actual arbitration clause stated '... any question relating to the interpretation of the provisions of this report brought forward by a local education authority acting through the authorities "panel or by any association of teachers acting through the teachers' panel or by consent of the chairman of the Burnham Committee" shall be considered ... and determined by the joint committee'.<sup>20</sup> So in this case an individual could not activate the procedure without the consent of the Chairman of the Committee. However, if the individual had had the capacity to activate proceedings there would seem to be a stronger case for imposing an individual obligation. If this had been the position it would be much easier to hold that the clause was concerned with the 'mutual rights and obligations of employers and employees' and not purely with '... the mutual rights and obligations of the parties to the ... collective bargain'.<sup>21</sup>

It remains to be considered what benefit an individual might gain from the transformation of a procedural clause contained in a collective agreement into an individual contractual obligation. During the life of the employment relationship the value of such rights is, in practice, contingent on the employer's willingness to respect them. Such willingness may flow simply from respect for obligations voluntarily entered into or, possibly more

realistically, by virtue of the social and economic power of the trade union. While in theory an employee can seek remedies for breach of contract, this cannot be generally regarded as a practical option.

Should questions as to termination of the relationship arise, a complaint of unfair dismissal may be lodged. 'As a general rule, an employer will not satisfy a tribunal that he acted reasonably in taking a decision to dismiss unless the procedure he adopted in reaching that decision was itself a reasonable procedure in the circumstances.'<sup>22</sup> The tribunal will already be obliged to take account of the ACAS Code of Practice but an employee's contract may afford him greater protection. In any event, the contractual position will still be of relevance. In Bailey v BP Oil Kent Refinery Ltd. a collectively agreed disciplinary procedure (which appears to have been incorporated into the individual contract) provided that 'the company will inform the appropriate full-time official as soon as possible of any case in which dismissal or downgrading is contemplated'.<sup>23</sup> The Court of Appeal stated that 'in most cases, if not all, a failure to comply with such an agreement would be a factor to be taken into account; but the weight to be given to it would depend upon the circumstances'.<sup>24</sup>

### Collective Obligations

It should be made clear that in collective agreements a number of substantive norms are inappropriate for incorporation since they exist solely to govern the relationship of the collective parties. At one time it would probably have been accepted that the rights of trade union officials to facilities provided by the employer fall

within this category. The case of City and Hackney Health Authority (see above) demonstrates that this is now more questionable.<sup>25</sup> This illustrates once more the overlap between individual and collective rights. It also shows the difficulty of translating a collectively agreed term which is to have normative effect at the individual level into the employment contract (see below). Other types of clause also present difficulties. Professor Lord Wedderburn states that '... it is not easy to incorporate into any individual worker's contract the ... [clause] ... "the proportion borne by the aggregate number of boys to the aggregate number of men [in certain departments] shall not exceed one boy to every four (or fractional part of four) men"'.<sup>26</sup> At first sight the clause would seem to relate to the terms and conditions on which individual employees work. The difficulty stems from the fact that the wording of the clause in no way suggests what the equivalent individual contractual right would be. Thus the wording of a clause might indicate that it was not intended for incorporation.

More controversial is the case of British Leyland UK Ltd v McQuilken.<sup>27</sup> There a redundancy agreement was held by the EAT to be inappropriate for incorporation on the grounds that the "... agreement was a long-term plan, dealing with policy rather than the rights of the individual employees".<sup>28</sup> The key clause provided that the '... employees ... would be interviewed by a member of the personnel department with the object of establishing a list of employees who wished to take up the option of (a) retraining or (b) redundancy'.<sup>29</sup> It would seem that it would not have been difficult to have held that the employee had a contractual right to elect for either retraining or redundancy.

### What is Incorporated?

When a contractual term is derived from a collective bargain what is the subsequent relationship between the two agreements? The individual terms will not be affected by any change in the currency, etc. of the collective bargain; these terms will only alter as a result of the normal rules of variation of contract. Thus in Morris v CH Bailey Ltd it was stated that 'it is true that terms of those agreements were incorporated into the contract of service, but they remained ... in that contract whether or not the agreements between the union and the association continued'.<sup>30</sup>

This view of the position was confirmed by the Court of Appeal in Robertson v British Gas Corporation.<sup>31</sup> There the employment contract provided for an incentive bonus to be paid, "... its amount and the terms governing it are to be found in an agreed collective scheme in force from time to time".<sup>32</sup> Subsequently the employer gave notice of withdrawal from the collective agreement and the question arose as to the affect on the individual contract. The Court rejected the view that '... the contracts of the individual workmen can be varied by some unilateral variation or abrogation or withdrawal from the collective agreement by either side'.<sup>33</sup> Should the collective agreement terminate the terms of the individual contract '... unless expressly varied between the individual and the employer, will remain as they were by reference to the last agreed collective agreement incorporated into the individual contracts'.<sup>34</sup> It can, therefore, be seen that it is not the collective agreement which is incorporated but merely the appropriate terms contained therein.

### Translation

Where a court has formed the view that a term is in principle capable of incorporation it will then have to formulate the wording of the individual clause. It is erroneous to incorporate the collective clause word for word into the employment contract. Instead the court should look to the purpose of the clause and devise appropriate wording. This was the approach adopted by the Inner House of the Court of Session in Burroughs Machines Ltd v Timmoney.<sup>35</sup> There a difficulty arose as to the precise wording of a contractual term relating to guarantee payments derived from a collective agreement. The collective agreement was made between the union and an employers' association; the company subsequently resigning from the association. The effect of this was stated in categorical terms by the court: "There is no doubt that the act of the company in resigning from the Federation had and could have no effect whatever upon the contract of employment between the respondent and the company".<sup>36</sup> The difficulty flowed from the fact that a proviso to the collective agreement provided that guarantee payments would not be made "in the event of dislocation of production in a federated establishment as a result of an industrial dispute in that or any other federated establishment".<sup>37</sup> The EAT had incorporated this proviso word for word so that only dislocation in a federated establishment could bring the proviso into operation. The EAT consequently holding that since the "... appellants were no longer a 'federated establishment' ... the exception could not apply".<sup>38</sup> On appeal this interpretation was rejected: "... the employer offered and the employee accepted employment on certain interdependent terms and conditions. The 'guaranteed week' provision in favour of the employee was clearly

and explicitly conditioned by acceptance by the employee of the ...  
[proviso] ...".<sup>39</sup>

Before assessing the validity of the approach of the Inner House it is interesting to make two observations as to the affect of the appeal. In the first place, the EAT had regarded their own decision as anomalous "... and probably contrary to what the parties themselves intended but having regard to the wording used in this particular agreement we feel that it is incorporable".<sup>40</sup> As the appellants successfully argued: "... it cannot be supposed that the parties intended that, for example, the accident of the dissolution of the Federation should have the effect of disabling the Company from enacting the practice of the guarantee ...".<sup>41</sup> Secondly, only employees who had served a qualifying period were entitled to a guarantee payment. A result of the EAT's construction of the agreement was that qualification was only open to those who had been employed while the company was a member of the federation. It had been submitted that '... it would be an absurd situation if part of the hourly paid workforce enjoyed the benefit of the guarantee while the remainder did not ...'.<sup>42</sup> The EAT could only comment that 'it may be that such a situation would be a potential source of industrial strife but giving the words their natural meaning they lead to this conclusion'.<sup>43</sup>

The Inner House accordingly looked at the term in issue and asked, would incorporation serve a plausible purpose? While a more creative approach is to be welcomed its successful operation necessitates a genuine appreciation of the dynamic nature of the employment relationship. Obviously a knowledge of the realities



of industrial relations is of similar importance. It must be stressed, however, that the Court unlike both the EAT and the IT did not persist "in a narrow literal interpretation despite a fundamental change in circumstances which was crucially relevant to the process whereby the guaranteed week was built into the individual contracts".<sup>44</sup>

By way of a footnote it is interesting to note that the same collective agreement became the subject of discussion in Bond v Car Ltd<sup>45</sup> Mr. Justice Pain commented: "It seems to me to be plain that the 1974 agreement was intended to suspend the guarantee only where no work was available for a particular employee. I do not think it was intended to give an employer a general right of lay-off wherever he could point to some dislocation of production by reason of an industrial dispute in a federated establishment".<sup>46</sup> It must be pointed out that the interpretation accepted by Pain, J does not appear to have been put before the Inner House in Burroughs. Nevertheless a comparison of the two decisions illustrates the difficulties involved in the interpretation of collective agreements.

#### "No Strike" Clauses and Statutory Intervention

S 18(4) TULRA 1974 prevents the incorporation of "no-strike" clauses contained in collective agreements into individual employment contract unless certain conditions are fulfilled.<sup>47</sup> The sub-section applies to '... any terms of a collective agreement ... which prohibit or restrict the right of workers to engage in a strike or other industrial action, or have the effect of prohibiting or restricting that right ...'. By restrictions on



the rights of workers to take industrial action the legislature presumably has in mind provisions such as those which forbid 'hostile action' before procedure is exhausted.

The provision applies to agreements made before and after the commencement of s 18. Moreover, s 18(5) excludes the possibility of contracting out of s 18. Incorporation will not take place unless the agreement (a) is in writing; and

- (b) contains a provision expressly stating that those terms shall or may be incorporated in such a contract; and
- (c) is reasonably accessible at his place of work to the worker to whom it applies and is available for him to consult during working hours; and
- (d) is one where each trade union which is a party to the agreement is an independent trade union; and unless the contract with the worker expressly or impliedly incorporates those terms in the contract.

These conditions are fairly stringent and should exclude any 'accidental' incorporation of 'no-strike' clauses. At the same time it would seem that the conditions will have the effect of clearly disclosing the existence of individual 'no-strike' clauses. On the other hand, incorporation into the individual contract need only be implied and it might be felt any 'disclosure'-type philosophy would be better furthered by insisting on an express term. One can also note the stipulation concerning the independence of the trade union involved; the need for worker representatives to be able to bargain at arm's length over this type of matter is obvious.

In practice incorporation of such clauses is likely to be rather rare. Should such a clause be incorporated, however, it is arguable that any strike which complies with it would not be in breach of contract.

Curiously s 18(4) appears to have been overlooked by the Outer House of the Court of Session in Partington v NALGO.<sup>48</sup> This case centred round a clause in a collective agreement which dealt with the procedures to be followed before the taking of industrial action. The clause stated: "... in the event of industrial action being taken, the trade unions and employers will have prior discussions about the necessary cover and arrangements to ensure safety or to deal with emergencies and will reach agreement, whenever possible, on the identity of those employees who are required to provide such cover. It is therefore agreed that the trade unions will grant special dispensation to any members so identified".<sup>49</sup> The Court held that the clause had been incorporated into the employment contract and that, as a result, the employee was bound to obey the instruction of Scottish Gas to return to work. S 18(4) apart the clause would still seem inappropriate for incorporation. First, the wording of the clause would clearly seem to suggest that the intention was to affect solely the relationship of the collective parties. Secondly, the import of the clause is to impose duties on the management and union as to consultation and to impose a duty on the union to grant dispensation in specified circumstances. It is difficult to see how such collective duties can be extended to the individual level. For example, the duty and power to grant dispensation is exclusive to the trade union and it is very hard to envisage an individual counterpart.

CHAPTER 6: COLLECTIVE AGREEMENTS AND EMPLOYMENT CONTRACTS  
FOOTNOTES

- 1 [1958] 1 All ER 91 at 94.
- 2 Ibid at 95.
- 3 S 1 EPCA 1978.
- 4 S 2(3) EPCA 1978.
- 5 [1974] ICR 420.
- 6 [1979] IRLR 425.
- 7 [1983] ICR 351, 354.
- 8 Smith v Blandford Gee Cementation Co Ltd [1970]  
3 All E R 15k.
- 9 [1981] IRLR 477, 481.
- 10 Op cit at 357.
- 11 1912, 2 SLT 50.
- 12 Ibid at 52.
- 13 Montresso Shipping Co Ltd v ITWF [1982] ICR 675.
- 14 1973 JR 22 at 41.
- 15 Hunter 1975 J R 47 at 52.
- 16 Ibid at 53.
- 17 Ibid at 54.
- 18 1973 JR 22 at 38: see also Scottish Law Commission, Memorandum  
No 38, Constitution and Proof of Voluntary Obligations at 45.
- 19 See page
- 20 Ibid at 47.
- 21 Ibid at 46.
- 21a It is interesting to compare cases concerning industrial  
action. See Heatons Transport (St Helens) Ltd v TGWU [1972]  
ICR 308 and Chappell v Times Newspapers Ltd [1975] ICR 145.  
See now Boxfoldio Ltd v NGA (1982). [1988] IRLR 383.
- 21b For an early example of a trade union being regarded as the  
agent of its members, see Kelly 31 T IR 632, 634: 'The  
Committee of the society was the agent of all the members of  
the society...'.

- 22 Holland v London Society of Compositors (1924) 40 TLR 440, 441.
- 23 Ibid.
- 24 Burton Group Ltd v Smith [1977] IRLR 351.
- 25 Ibid at 353.
- 26 Mordecei v Jacob Bestus Ltd [1975] IRLR 170.
- 27 S 18 TULRA 1974.
- 28 S 30 TULRA 1974.
- 29 [1969] 2 QB 303.
- 30 Ibid at 312.
- 31 [1961] 2 All ER 825.
- 32 Ibid at 827.
- 33 [1963] 1 QB 623 at 675.
- 34 Hepple and O'Higgins: Employment Law (4th edn) p 127.
- 35 [1964] 1 WLR 349.
- 36 Ibid at 350.
- 37 K W Wedderburn, The Worker and the Law, p 190 (2nd edn).
- 38 Ibid at 186.
- 39 [1975] IRLR 170, 171.
- 40 Singh b British Steel Corporation [1974] IRLR 131.
- 41 Ibid at 135.
- 43 Kahn-Freund, Labour and the Law (2nd edn) 133, 134.
- 44 Chity on Contracts (24th edn), para 793 (General Principles).
- 45 Loman v Merseyside Transport Services Ltd [1967] 3 ICIR 726.
- 46 Sager v Ridehalgh & Son Ltd [1931] 1 Ch 310.
- 46a Ibid at 343 per Rorer LJ.
- 46b Ibid at 336 per Lawrence LJ.
- 47 MacLea v Essex [1933] 45 Lloyd IR 254, 257.

- 48 Davies and Freedland, Kahn-Freund's Labour and the Law (3rd edn) p 168.
49. Kahn-Freund, Labour and the Law (2nd edn) 137.
- 50 Flanders & Clegg (ed), The System of Industrial Relations in Great Britain, p 58.
- 51 [1976] IRLR 343.
- 52 Freedland 1976 ILJ 254.
- 53 Ibid at 256. 53in 1967 KIR 659.
- 53a 1967 KIR 659.
- 54 See Treitel, The Law of Contract (6th edn) p 158 et seq.
- 55 [1983] ICR 351, 358.
- 56 Ibid.
- 57 (1967) 3 KIR 726.
- 58 Ibid at 730.
- 59 Ibid at 730.
- 60 Ibid at 730-731.
- 61 K W Wedderburn 1969 MLR 99, 102.
- 62 Ibid at 101.
- 63 [1974] ICR 420.
- 64 Ibid at 425, per Lord Denning MR.
- 65 Ibid at 425.
- 66 Ibid.
- 67 1967 ITR 292.
- 68 [1983] IRLR 191 (EAT).
- 69 Ibid at 193.
- 70 M R Freedland 1983 ILJ 256, 257.
- 71 Donelan op cit at 192.
- 72 Davies and Freedland, Labour Law Text and Materials (2nd edn) 294.
- 73 Ibid.

- 74 M R Freedland 1983 ILJ 256, 257.
- 75 [1978] ICR 1101.
- 75 See also the discussion of Clift West Riding C C in 1969 MLR 9 at 100, (K W Wedderburn).
- 76 [1978] ICR 1102.
- 77 For discussion, see Davies and Freedland, Kahn-Freund's Labour and the Law, (3rd edn) pp 175-177.
- 78 [1966] 1 QB 555.
- 79 Ibid at 561.
- 80 Ibid at 563.
- 81 Ibid at 563.
- 82 Kahn-Freund, Labour and the Law, (2nd edn) p 122, n 1.
- 83 Wilson 1984 ILJ 1 at 8.
- 84 Davies and Freedland, Labour Law Text and Materials, (2nd edn), 289
- 85 Award 272.
- 86 Award 3225 at p 41.
- 87 Ibid at 37.
- 88 Ibid at 41.
- 89 [1973] 2 All ER 709.
- 90 Ibid at 715.
- 91 1976 ILJ 102.
- 92 [1974] ICR 378 (HL).
- 93 Ibid at 401.
- 94 [1974] ICR 13 (NIRC).
- 95 Ibid at 20.
- 96 Ibid.
- 97 1974 ILJ 52.
- 98 Ibid at 53.
- 99 Award 78/399.

- 100 Award 77/27.
- 1 Doyle, 1980 ILT 154 at 159.
- 2 [1985] IRLR 252 (CA) 103 ibid at 253.
- 3 Ibid at 253.
- 4 [1985] IRLR 252 at 255.
- 5 Ibid.
- 6 Ibid.
- 7 [1983] IRLR 320 (HC).
- 8 NCB v NUM [1986] IRLR 439, 454.
- 9 Ibid.
- 10 R I Marsh, Dispute Procedures in British Industry, Donovan Commission Research Paper No 2(1), p 18.
- 11 TADD v Daily Telegraph [1983] IRLR 320, 323.
- 12 Davies and Freedland, Labour Law Text and Materials (2nd edn) p 292.
- 13 Industrial Relations Code of Practice, para 123.
- 14 Murray v British Rail [1976] IRLR 382 (see also Barber v Manchester Regional Hospital Board [1958] 1 WLR 181, cf Rodwell v Thomas [1944] 1 KB 596).
- 15 Ibid at 384.
- 16 [1966] 2 WLR 363.
- 17 Wedderburn and Davies, Employment Grievances and Disputes Procedures in Britain, p 133.
- 18 [1966] 2 WLR 363.
- 19 Ibid at 366.
- 20 Ibid at 366.
- 21 Ibid at 387.
- 22 Anderman, The Law of Unfair Dismissal (1st edn) 81.
- 23 [1980] ICR 642 (CA) 645.
- 24 Ibid at 648.
- 25 [1985] IRLR 252.



- 26 K W Wedderburn, The Worker and the Law (2nd edn) p 193.
- 27 [1978] IRLR 245 (EAT).
- 28 Ibid at 246.
- 29 Ibid at 245.
- 30 [1969] 2 Lloyds Rep 215, 219.
- 31 [1983] ICR 351 (CA).
- 32 Ibid at 358.
- 33 Ibid at 358.
- 34 Ibid at 358.
- 35 [1977] IRLR 404 (Ct of Session).
- 36 Ibid at 405.
- 37 Ibid at 405.
- 38 [1976] IRLR 343, 344.
- 39 [1977] IRLR 404, 406.
- 40 [1976] IRLR 343, 344.
- 41 [1977] IRLR 404, 406.
- 42 [1976] IRLR 343, 344.
- 43 Ibid.
- 44 [1977] IRLR 405.
- 45 [1983] IRLR 350.
- 46 Ibid at 366.
- 47 Elias, Napier and Wallington, Labour Law Cases and Materials, p 74 provide an example of an agreement designed to meet the requirements of s 18(4).
- 48 [1981] IRLR 537 (Ct of Session) Noted B W Napier 1982 SLT (News) 169.
- 49 Ibid at 539.

## CHAPTER 7

### THE LEGAL IMPORT OF COLLECTIVE AGREEMENTS

Following the repeal of the Industrial Relations Act Parliament passed a new provision to cover the position of collective agreements. S 18 of TULRA 1974 creates a conclusive presumption that collective agreements<sup>1</sup> are not intended by the parties to be legally enforceable unless a number of specified conditions are fulfilled. These conditions are that the agreement is in writing, and contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract. How explicit must that intention be? It seems clear that it would not be legitimate to infer an intention from the nature of the agreement or its wording in general. 'S 18 evinces ... an intention on the part of the legislature that questions as to the legal enforceability of a collective agreement should no longer depend on argument about the inferences to be drawn from the contents of the collective agreement or from the matrix of the collective agreement.'<sup>1a</sup> The section was intended to avoid argument 'as to the inferences that could legitimately be drawn from the language used in collective agreements, and to the industrial relations functions of collective agreements'.<sup>2</sup> There must be a provision which expresses that intention. On the other hand, the use of the term 'however expressed' shows that any form of wording indicating a desire for legal enforcement would suffice. 'Unless a collective agreement contains a statement in terms that show, at least, that the parties have directed their minds to the question of legal enforceability and have decided in favour of

legal enforceability, there is ... no sufficient statement of intention for the purposes of s 18.<sup>3</sup> If the conditions are satisfied the agreement is conclusively presumed to have been intended by the parties to be a legally enforceable contract. There may, however, be other reasons which prevent the agreement from amounting to a contract.

S 18(3) allows the parties to restrict legal enforcement to specified parts of the agreement. In such a case the remainder of the agreement is then conclusively presumed not to have been intended to be legally enforceable. However, in interpreting the legally enforceable part, the courts can have regard to the rest of the agreement. Collective Agreement is defined by s 30(1) to mean 'any agreement or arrangement made by or on behalf of one or more trade union and one or more employee or employers' association and relating to one or more of the matters mentioned in s 29(1) of TULRA. (Though if the agreement relates to one or more of the matters mentioned it is irrelevant that it also relates to other matters.)

S 18 only applies to agreements made before 1 December 1971 or after the commencement of the section (16.9.74). This leaves the question of the status of agreements entered into between those dates. S 23(3) TULRA 1974 provides that where any right, obligation or liability has been accrued or incurred under any provision of the 1971 Act before the repeal of that provision by this Act takes effect, but no proceedings have been commenced in any court or tribunal to enforce that right, obligation or liability, no proceedings to enforce it (directly or indirectly by

whatever means) shall be commenced in any court or tribunal after that repeal takes effect. It would appear then that of agreements entered into between 1 December 1971 and 15.9.74 only those which were legally enforceable at common law would remain so enforceable.

Since it is very rare for a collective agreement to be directly legally enforceable between the collective parties it is clear that the main way in which collective agreements achieve legal effect is through incorporation in the individual employment contract.<sup>4</sup> Nevertheless, the courts may give some legal effect to collective agreements in other contexts.

#### Motive and the Golden Formula

To gain the protection of the golden formula industrial action must be taken for a proper purpose. Prior to s 18(1)(c) of the Employment Act 1982 the dispute had only to be "connected with" one of the matters listed in s 29(1) TULRA 1974. S 18(1)(c) substitutes the formula "relates wholly or mainly to" and this requires the courts to ascertain the real reason for the dispute. In the words of the Court of Appeal, "it is necessary to consider not merely the occasion which caused the dispute to break out but also the reason why there was a dispute".<sup>5</sup> Before the House of Lords decision in NWL v Woods<sup>6</sup> the Court of Appeal adopted a restrictive approach to the "connected with" formula and various factors were taken as evidence of extraneous motives. It seems possible that such approaches might be brought back into play.

In Star Sea Transport Corporation of Monrovia v Slater<sup>7</sup> '...the ITF had made a demand which was virtually impossible for the owners to

fulfil'.<sup>8</sup> The unreasonableness of this demand was regarded as going towards the presence of an ulterior motive. In PBDS v Filkins<sup>9</sup> the fact that the strike was unofficial was regarded as indicating extraneous motive: '...the defendant is not acting in furtherance of a trade dispute but in order to demonstrate that the London Branch and its ... officials are not to be trifled with or flouted'.<sup>10</sup> Ewing has argued that 'The great danger which these developments open up is the possibility of the courts taking the view in the normal run of cases that unofficial and unconstitutional action is beyond the role of the immunity. If as in Associated Newspaper Group Ltd v Wade it was contrary to principle to by-pass statutory disputes procedures, is it not open to the courts to infer the existence of the ulterior motive from a failure to use procedures agreed by the parties?'<sup>11</sup>

The only case since 1982 which sheds any light on this area is Mercury Communications Ltd v Scott-Garner.<sup>12</sup> There the court appeared to regard the job security agreement as sufficient to safeguard the interests of the employees and any demands beyond this as unreasonable. However, the case did not furnish any evidence as to the judicial approach when collectively agreed procedures are not followed. As a result whether, and to what extent, a failure to adhere to procedure would be regarded as evidence of ulterior motive remains problematic.

It should be noted that Ewing went on to argue that '... motive limitation may not simply control the purposes of the industrial action. What the Court of Appeal appeared to be embarking upon in cases such as Wade and Filkins was the creation of a body of

principle which would also have made the immunity contingent upon the application of proper procedures".<sup>13</sup> And in Filkins Lord Denning did state "that officers of a trade union may take themselves outside their statutory immunity if they make demands which are wholly extortionate or utterly unreasonable or quite impossible to fulfil".<sup>14</sup> Such statements, which suggest that an unreasonable demand may per se constitute an improper motive, go beyond most of the dicta. So while an unreasonable demand may be evidence of an ulterior motive, it would still be necessary to demonstrate what the extraneous motive is.

#### Dismissal

In Bailey v BP Oil (Kent Refinery) Ltd, which was an unfair dismissal case, the Court of Appeal stated that a failure to comply with a collectively agreed disciplinary procedure '... would be a factor to be taken into account, but the weight to be given to it would depend upon the circumstances'.<sup>15</sup> The relevance of a breach of a collective agreement in unfair dismissal proceedings came to the fore in Kent County Council v Gilham.<sup>16</sup> There the terms and conditions of employment were fixed by national agreement. The council terminated the existing employment contracts and offered new contracts which were not in accordance with the national agreement. The industrial tribunal held that the employees had been unfairly dismissed; '... a reasonable local authority would not have dismissed ... in the circumstances of this case'.<sup>17</sup> In restoring the IT's decision the Court of Appeal clearly regarded the breach of the collective agreement as being of considerable significance. Lord Justice Dillon stating that "it is of obvious importance, in the fields of employment law and of industrial

relations, that national agreements negotiated between employers and trade unions as to wages and conditions of employment should not be breached unilaterally by an employer".<sup>18</sup> Again Lord Justice Griffiths felt it was "... legitimate for the tribunal to ask itself whether in the circumstances a reasonable employer would defer a decision to breach a national agreement until there had been time for the matter to be considered at a national level".<sup>19</sup>

The Kent County Council case indicates that it may be more difficult to show that a dismissal is reasonable where a breach of a collective agreement is involved. On the other hand, the tribunal in Gilham had been referred to two unreported tribunal decisions, which, on very similar facts, had gone the other way. Given that the question of reasonableness is a question of fact, an appellate body would probably have refused to interfere with those decisions.

R v Hertfordshire CC is also of interest.<sup>20</sup> The facts were broadly similar to Gilham but the remedy sought was different, judicial review was pursued on the basis that no reasonable authority could have adopted the course of action which was in fact adopted. It was submitted that the local authority's action involved '... a departure from a nationally agreed structure of collective agreements which have for years governed the wages and conditions of service of most local authority employees. One of the principal purposes of this structure has been to do justice between different groups of these employees. Such a departure in relation to one group only is manifestly unfair and, as such, unreasonable'.<sup>21</sup> The local authority had, however, taken into



consideration the value of preserving the national agreement and it was not possible to say that no reasonable authority could have adopted the decision that was actually reached.

### Trade Union Discipline

Partington v NALGO, has already been discussed in the context of s 18(4).<sup>22</sup> (See above p 212.) It will be recalled that the case centred on a clause in a collective agreement which dealt with the procedures to be followed before the taking of industrial action. The pursuers had been expelled from NALGO after they had reported for work, despite having been instructed to strike. It was found that, as a result of the terms of para 10 of the collective agreement, employees were contractually bound to obey an instruction by the employer to return to work. Rule 12(a) of the union rule book provided that: '... A member who disregards any regulation issued by the Branch or is guilty of conduct which, in the opinion of the Executive Committee, renders him unfit for membership shall be liable to expulsion.' The court held that this power of expulsion must be read subject to para 10 of the collective agreement. As a result the union was not entitled to expel the pursuers.

The collective agreement was presumably not legally enforceable between the collective parties. Appropriate terms, and those in the opinion of the court included para 10, were incorporated into the employment contracts. The court gave the collective bargain added normative effect by treating it as a constraint on the union rule-book.

It appears clear, on the authority of Porter v NUJ, that unions can discipline members who refuse to take part in industrial action because it would involve a breach of the employment contract.<sup>23</sup> Now Porter is not referred to in the judgment in Partington and it may be it was not cited. This allows for the possibility that the judge in Partington was not aware of the rule emanating from Porter and may have taken a contrary view of the position. Alternatively, if Partington is to be reconciled with Porter, it must be on the basis that unions cannot discipline members who refuse to take part in industrial action which would involve breach of a collective agreement. Indeed in Porter Lord Denning stated, obiter, that, '... if there was a breach by the union of the collective agreement a man would have a defence to a charge against him'.<sup>23a</sup>

More recently in Longley v NUJ it was sought to expel the plaintiff on the basis of Rule 18 which allowed for expulsion where '... a member has been guilty of conduct which is detrimental to the interests of the union ...'.<sup>24</sup> This followed a refusal to obey a strike call. It was submitted that the instruction to strike '... was ultra vires the NEC, on the ground that rule 15(b) provides that every chapel is responsible, amongst other things, for 'ensuring that union agreements are observed'....[it was]... submitted that the instruction breached the disputes procedures prescribed by clause 12 of the house agreement between TNL and The Times chapel ... Accordingly ... the instructions required ... the members of the chapel to act contrary to their responsibilities under Rule 15(b)'.<sup>25</sup> Lord Justice Norse accepted that, if this submission was correct, it would decide the case in favour of the

plaintiffs. However, he was '... by no means certain that it is correct'. Moreover, in contrast to the philosophy in Partington, '... it seems ... that rule 18(a) may entitle the NEC in certain circumstances effectively to override the requirements of rule 15(b)'.<sup>27</sup> In any event Parliament has intervened by virtue of s 3 of the 1988 Employment Act.

### Interim Interdicts

A relatively recent Scottish case suggests that the courts may, through the process of granting interim interdicts, be attempting to offer some indirect enforcement of collective agreements. In Phestos Shipping Co v Kurmiowen a trade dispute arose over pay, overtime and manning levels.<sup>28</sup> Subsequent to a sit-in the employers were granted a interim interdict. In deciding that the balance of convenience lay in favour of the petitioners the court placed some store on the fact that the employees had an alternative remedy. It was suggested, judicially, that the employees ought to raise "... an action for payment ... based either on the contracts themselves or on breach of them."<sup>29</sup> The decision would infer that failure to exhaust (or commence) legal remedies would count against one when it came to the granting of interdict. The question that then arises is whether the courts would view with disfavour a failure to exhaust non-legal remedies (eg collectively agreed disputes procedures). The prospect emerges of the courts giving indirect enforcement to procedure agreements.

In some cases there may be a choice of remedies. The union may utilise agreed procedures or the employees may sue for breach of contract. If the union has exhausted the agreed procedure what

significance, in weighing up the balance of convenience, would the court place on a failure to use legal remedies? The orthodox view of labour lawyers has been that collective bargaining carries its own autonomous sanctions. So where a court is weighing up the balance of convenience in a case where a union has taken industrial action, following the exhaustion of agreed procedures, then the failure to use legal remedies should be ignored. Indeed, an exhaustion of domestic remedies should be viewed as an element in the union's favour.

#### Economic Delict - Defences

A legally unenforceable contract may not be a contract at all but, nevertheless, the courts still give it some weight in a number of contexts. They are perhaps inspired by the maxim 'pacta sunt servanda'. One area where a breach of a collective agreement might also be thought relevant is the matter of the defence of justification to the economic delict of inducing breach of contract.

'That there is a defence of sufficient justification is clear from the authorities ..., but there is not a good deal of authority on the question as to what is sufficient.'<sup>30</sup> Moreover, it has recently been stated that the '... plea of justification nowadays is a flexible one and should not be regarded as confined to narrow straitjackets'.<sup>31</sup> In the days when the statutory immunities provided an adequate shield against the operation of the common law the issue was one of little practical importance but in present circumstances the matter emerges as one of considerable interest.

If an employer were to break a collective agreement would a trade union be justified in inducing breach of contract?<sup>32</sup> It is very difficult to find any general principle to explain the law on justification. In a recent New Zealand case it was said that 'The only general principle ... is that advancement of one's own interests, even with the highest and most altruistic motives, will not suffice, it must involve action taken as a duty' or 'exercise of an equal or superior right in themselves'.<sup>33</sup> So '... defendants are justified in protecting their existing contracts, property interests, and financial interests. Contractual privilege, for example, arises where the contract breaker had made two inconsistent contracts, and either the first was made with the defendant, or the defendant had no knowledge of the plaintiff's contract when he contracted.'<sup>34</sup> Two difficulties arise for trade unions. First, collective agreements will normally not be a contract at all. Second, a union may wish to induce breach of an employment contract though that contract is independent of the collective agreement.

The first point is illustrated by the following example. A collective agreement provides that the employer shall only use sub-contractors who employ union-only labour. If the employer breaches this agreement and enters into an inconsistent contract with a sub-contractor and the trade union persuades either the sub-contractor or the employer to break the contract would it be possible to make out the defence of justification? The two agreements are inconsistent but the prior one is not a contract. It may be doubted whether acting to protect such a prior agreement is to exercise '... an equal or ... superior right'. Non-

contractual agreements will perhaps not be viewed as being on the same plane as legally enforceable ones. It is submitted, however, that there are policy arguments which would allow the lack of enforceability of a collective agreement to be ignored. (See below p 235, as to the legislative intention that collective agreements be adhered to.)

The second difficulty is amply illustrated by the case of Smithies v National Association of Operative Plasterers.<sup>35</sup> There the union believed that the employer's federation was intending to evade a settlement of a dispute in accordance with a national agreement. This was held not to constitute a sufficient cause to justify the trade union in procuring the breach by the employees of their employment contracts. It was said that '... it might be a justification ... if the union had done no more than induce Forrester to breach a contract with Smithies having regard to the provisions of the national agreement, ought never to have made both Forrester ... [But the union contention is rather:] "We are entitled to induce Forrester to break his contract with you because you had broken your contract, as contained in the national agreement, with us"... This contention cannot be contained'.<sup>36</sup>

Two points may be noted. First, the court in Smithies appear to have assumed that the collective agreement they were dealing with was a contract. Normally, the problems discussed above in connection with non-contractual agreements will apply. Second, certain terms of collective agreements will be purely collective in nature and will be not legally enforceable through the medium of the employment contract.

The New Zealand case of Pete's Towing Services Ltd. indicates that a wider view of the justification defence may now be taken in labour disputes.<sup>37</sup> There the trade union was found to be justified in inducing breach of a commercial contract of the plaintiff on account of the plaintiff's breach of industrial law which was threatening good industrial relations. Grunfeld believes that the result of the case is that '... A distinction must be drawn between economic disputes and disputes of principle. As to the former, the pursuit of 'legitimate interests' or, in Speight J's phrase, "justifiable self-interest" would be ... be barred as a defence by ... SWMF ... But a dispute of principle, for example, about recognition, or bona fide compliance with an agreed disputes procedure, or about tolerating a breakaway union, stands on a different footing in industrial relations and remains open to a plea of justification at common law ...'<sup>38</sup>

In any event one might argue that the position of collective agreements vis-à-vis employment contracts would allow an expansion on policy grounds, of the inconsistent contracts rule. It has been suggested that the only safe guide to the limits of the doctrine of justification is the dictum of Romer LJ in the Court of Appeal in Glamorgan Coal Co Ltd v South Wales Miners' Federation which as states:

'I will only add that, in analysing or considering the circumstances, I think that regard might be had to the nature of the contract; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the



contract; and I think also to the object of the person in procuring the breach.'<sup>39</sup>

While Smithies treats a collective agreement as constituting a separate agreement from an employment contract it is suggested that the nature of these agreements invites a different approach. Despite being conceptually distinct the two devices are, in practice, inextricably linked and act together to provide a labour code for the workplace. It therefore becomes artificial to suggest that an employer's breach in one sphere will not permit the visitation of sanctions in the other. Moreover, there are two policy arguments which reinforce the foregoing argument.

First, the contract of employment denotes a relationship of subordination: 'The individual employee or worker ... has normally no social power, because it is only in the most exceptional cases that, as an individual, he has any bargaining power at all.'<sup>40</sup> Since an employee's power flows from trade unionism it is crucial that trade unions be able to preserve the sanctity of the terms of collective agreements.<sup>41</sup> On the other hand, arguments based on inequality of bargaining power have been rejected as a basis of justification in Camden Norminness Ltd. v Forrey: 'It is a dangerous proposition that inequality in wealth justifies a course otherwise actionable'.<sup>42</sup> However, there are '... signs that ... the courts might be more willing to pay attention to various forms of economic pressure in modern times'.<sup>43</sup>

Secondly, and closely related to the foregoing is the question of self-help. Camden indicates that the law does not look kindly on

'self-help'.<sup>44</sup> However, while collective agreements will generally not be legally enforceable the legislature must also have desired a widespread and strong pressure of compliance with collective agreements and since such a degree of adhesion was unlikely in the absence of sanctions it must have been intended that the parties resort to peaceful 'self-help'. Indeed a more 'realistic' view of potential remedies may now be legitimate.<sup>45</sup>

CHAPTER 7: THE LEGAL IMPORT OF COLLECTIVE AGREEMENTS  
 FOOTNOTES

- 1 Assuming that the agreement falls within the definition of collective agreement in s 30(1) TULRA.
- 1a NCB V NUM [1988] IRLR 439 at 449, per Scott J.
- 2 Ibid.
- 3 Ibid.
- 4 In Commission of The European Communities v UK [1984] IRLR 29 at 35 it is reported that the British government was at that time, not aware of there being any legally binding collective agreements in force in the UK.
- 5 Mercury v Scott-Garner [1984] 1 All ER 179 per Dillon LJ at 216.
- 6 NWL Ltd v Woods [1979] ICR 867.
- 7 [1978] IRLR 507.
- 8 Ibid at 510, per Lord Denning MR.
- 9 [1979] IRLR 357. See also United Biscuits (UK) Ltd v Fall [1979] IRLR 111.
- 10 Ibid at 361.
- 11 K D Ewing, 11 1982 ILJ 209, 217.
- 12 Op cit. See also Associated British Ports v TGWU [1989] IRLR 291.
- 13 K D Ewing, 11 1982 ILJ 209 at 217.
- 14 PBDS (National Carriers) Ltd v Filkins [1979] IRLR 356 at 360.
- 15 [1980] ICR 642, 648.
- 16 [1985] IRLR 18.
- 17 Ibid at 21.
- 18 [1985] IRLR 18, 23.
- 19 [1985] IRLR 18, 22, 20 [1985] IRLR 258.
- 21 [1985] IRLR 258, 260.
- 22 1981 SLT 184. Noted by B W Napier, 1982 SLT (News) 169.
- 23 [1979] IRLR 404.
- 23a [1979] IRLR 404 at 405.

- 24 [1987] IRLR 109.
- 25 Ibid at 111.
- 26 Ibid at 111.
- 27 Ibid at 111.
- 28 1983 SLT 388.
- 29 Ibid at 392 per Lord Dunpark.
- 30 Per Goff LJ in Pritchard v Briggs 1980 Ch 338 at 415.
- 31 Grieg v Insole [1978] 1 WLR 302 per Slade LJ at 342.
- 32 Should the breach of the collective agreement be in respect of a matter such as pay there may well also be a breach of the individual employment contracts. In such a case one might argue that the general contractual principle of mutuality would allow an employee to withhold performance in response to the employer's breach. Consequently, a union could call for this to be done without inducing breach of contract. However, this line of approach tends not to be taken in Labour law cases.
- 33 Pete's Towing Services Ltd v Northern Industrial Union of Workers [1970] NZLR 32, 50 (quoting Darling J in Read v Friendly Society of Operative Stonemasons [1908] 2 KB 88, 96.
- 34 Heydon, Economic Torts, (2nd edn), p 39.
- 35 [1909] 1 KB 310.
- 36 Ibid per Buckley LJ at 337.
- 37 Op cit.
- 38 1971 MLR Vol 34, p 181.
- 39 [1903] 2KB 545 per Romer LJ at 574.
- 40 Davies and Freedland, Kahn-Freund's Labour and the Law (3rd edn), p 17.
- 41 In some instances individual employees might be able to sue for breach of the employment contracts. The operation of legal remedies, as opposed to self-help, is discussed in the text. Certain terms will not, however, be incorporated into the individual contracts. In such cases no alternative legal remedy is available.
- 42 [1940] Ch 352 per Simonds J at 366.
- 43 Atiyah, An Introduction to the Law of Contract, p 291 (4th edn).

44 Op cit at 365.

45 Pete's Towing Services Ltd, op cit.

## CHAPTER 8

### THE VARIATION OF COLLECTIVELY AGREED TERMS

The terms and conditions of work of many employees are derived at least in part, from collective agreements. The collective terms may be incorporated expressly into the individual employment contract. Incorporation can also, of course, be implied: 'The terms of a collective agreement are likely to be 'crystallised custom' and as such automatically implied in the relevant contracts of employment ...'.<sup>1</sup> One important issue which arises is the extent to which changes in the terms of collective agreements will bind individual employees. In Robertson v British Gas Corporation Lord Justice Kerr stated that '... when the terms of the collective agreement were varied by consent between the two sides, then the new terms clearly became incorporated into the individual contracts of employment'.<sup>2</sup> A number of dicta support this notion that contracts of employment are automatically varied as a result of agreed changes in collective agreements.<sup>3</sup> Automatic variation though must be dependant on the existence of an express or implied term providing for it. When it does occur the question arises as to whether there are any limitations on the employee's obligation to accept a variation in its terms and conditions.

Some assistance can be found in the various statutory provisions concerning unlawful discrimination. Individual equal pay or sex discrimination claims may be possible.<sup>4</sup> Furthermore, where a trade union negotiates a collective agreement a dissatisfied member may have a remedy against the trade union by virtue of either the

Sex Discrimination Act or the Race Relations Act. S 12(3) of the former Act stipulates that 'it is unlawful for ... [a trade union] ... in the case of a woman who is a member of the organisation, to discriminate against her - (a) in the way it affords her access to any benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, ..., or (c) by subjecting her to any other detriment'. A similar provision is contained in s 11 of the Race Relations Act.

What of other forms of discrimination? While at present statutory protection only exists in respect of discrimination on the grounds of race and sex it is possible to envisage discrimination taking place on other grounds. A union negotiating with a company in respect of different grades of workers may win concessions in favour of one grade only at the expense of disadvantaging another. What, for example, if the consideration for benefiting one grade was to impose an obligation to perform an unlimited amount of compulsory overtime on another?

A different hypothetical example is furnished by Clarke and Powell v Eley (IMI Kynoch Ltd).<sup>5</sup> There an agreed redundancy selection procedure which provided that part-time workers would be dismissed first was held to amount to unlawful discrimination within the terms of the Sex Discrimination Act. One might, however, discriminate against part-time workers for reasons other than race or sex and this might, in certain circumstances, be regarded as unfair.

If a collective agreement leads to a change in the terms and



conditions of an individual employee there may be a remedy, therefore, by virtue of UK discrimination law. In other situations what is the position of an individual employee who believes that a collectively agreed variation unreasonably discriminates against him?

#### Unfair Dismissal and Collective Re-negotiation

Where a collective agreement is varied by the collective parties the individual contract may be automatically varied. Whether this result will occur depends simply on the actual terms of the individual contract. Whatever the contractual position the law of unfair dismissal looms large. An employee who refused to accept re-negotiated terms may be dismissed or may in fact resign and claim to have been constructively dismissed. Such a dismissal may well amount to "... some other substantial reason ..." and hence be a potentially fair reason for the dismissal. Thus in Tavery v F & F Robinson it was held that "an employer can rely 'on some other substantial reason' to justify the dismissal of an employee who is not prepared to abide by the terms and conditions generally prevailing for that category of employee ... it would be impossible if special terms had to be negotiated for each individual employee at the place of work".<sup>6</sup>

Even where the employer makes out a potentially fair reason the decision to dismiss must be reasonable in the circumstances. Where a change in terms and conditions has been arrived at as a result of negotiation between a trade union and the employer it will be easier to show that any subsequent dismissal of a dissenting employee was reasonable. Thus in Sycamore v Myer & Co Ltd<sup>7</sup> the tribunal found that there had been "... protracted and

high level negotiations between the respondents and the appropriate trade union". They went on to "... take into account when considering what is reasonable and what is not that the terms were freely negotiated by the union on his behalf as a member and that all the other workers accepted them".<sup>8</sup>

So even where a variation of a collective agreement does not automatically affect an individual's employment contract the change might be protected by the law of unfair dismissal. The rationale behind this position is contained in the following statement: "Where employers negotiate a detailed agreement with a recognised union, they are entitled to assume that all employees who are members of the union know of, and are bound by, its provisions. There could be no stability in industrial relations if this were not so".<sup>9</sup> The desire to promote automatic variation is therefore strong.

If an employee refuses to accept a change in his contractual terms might the substance of the change led to a subsequent dismissal being unreasonable. In Evans v Elemeta Holdings Ltd the management of the Company issued new contracts to all employees which would have significantly altered the obligations of the complainant.<sup>10</sup> "In our view it is simply not a possible view to have reached, after analysis, to say that Mr. Evans was unreasonable in refusing to accept a contract which imposed upon him an unlimited obligation to work over-time, he being a man whose work under his existing contract did not have to ... do any over-time".<sup>11</sup> It deserves to be mentioned that Evans was not a case involving any change in a collective agreement but was simply a

case of an employer trying unilaterally to vary the employment terms of his workforce.

This case has been criticised on the basis that it is inappropriate to concentrate on the reasonableness of the employee's attitude. One should pose the question whether the employers were acting reasonably in dismissing the employee for his refusal to enter into the new contract. Nevertheless it is still the case that the impact on the employee remains in issue. The EAT in Chubb Fire Security Ltd v Harper recognised this in holding that "... the industrial tribunal should have considered whether (the employer) was acting reasonably in deciding that the advantages to them of implementing the proposed re-organisation outweighed any disadvantage which they should have contemplated ... (the employee) ...might suffer".<sup>12</sup> This conveniently leads us to a consideration of the duty of co-operation in employment contracts.

#### The Duty of Co-operation

Given that the law of unfair dismissal will normally favour the employer when he tries to impose changes in employment contracts following the variation of a collective agreement is the position any different where an employee alleges that the collectively agreed changes unreasonably discriminate against him. What of the employer's duty not to "... act in a way that, judged reasonably and sensibly, destroys mutual trust and confidence".<sup>13</sup> So in FC Gardner Ltd v Beresford it was stated that it was reasonable in most circumstances to infer a term to the effect that "... an employer will not treat his employee arbitrarily, capriciously or inequitably in matters of remuneration".<sup>14</sup>

The logical end-point of this developing aspect of an employer's duties would be to hold that an employer was under an implied duty to treat his employees reasonably. While the case-law has yet to go this far, and some recent decisions expressly deny the existence of such a term, "what the courts have been doing is to widen considerably the implied contractual terms under the contract of employment so as to find that many forms of unreasonable conduct .. constitute a breach of contract".<sup>15</sup> What of the position though when an employer seeks to change terms and conditions of employment following the variation of a collective agreement? To what extent will the existence of the duty of co-operation aid an employee in trying to show that any subsequent dismissal is unreasonable?

#### Situation 1

There is no contractual term allowing for automatic variation. The employer attempts to impose the change in terms precipitating the resignation of the employee who claims to have been constructively dismissed. If the change in terms amounts to a material breach of contract that should suffice to show dismissal but will the dismissal have been reasonable? The employer will allege that the desirability of uniform adhesion to the collectively agreed terms amounts to some other substantial reason. If the union has behaved "... arbitrarily, capriciously, or inequitably ..." in respect of the negotiation of the variation with regard to an individual or a group of individuals what effect will this have?

On the one hand, by implementing the terms of a collective agreement an employer will often be unaware of any arbitrary,

capricious or inequitable treatment by a trade union. It would place an added and, indeed perhaps on occasion, impossible burden on negotiations if an employer had to attempt to ensure that the union had fairly represented its members before signing an agreement. After all, it is inherent in the nature of trade unionism and collective bargaining that a union will have to concede claims made on behalf of one section of its memberships in order to benefit another section(s) or indeed the union as a whole. Even if an employer is aware of, say, the inequitable treatment of a particular individual it may be impracticable to restore his position through the negotiations. Further, adhesion to jointly negotiated terms might be thought to be an important ingredient of stable industrial relations.

On the other, one might argue that where contractual terms are the product of joint negotiation there is no reason why an employee should be in a worse position than when an employer sets contractual terms unilaterally. Given that the combined effect of contract law and the law of unfair dismissal is that variation of a collective agreement will generally result in the automatic variation of the individual employment contracts and that given that there has been no real development of a duty on trade unions of fair representation, there is a need to protect individual employees.<sup>16</sup> Employers benefit in a number of ways from collective bargaining and it would not seem unreasonable that, in return, individuals be safeguarded against discrimination.

Where employment contracts are broken as a result of changes in collective agreements it will normally be difficult to show that

any dismissal was unfair. In this situation, in addition to the breach of contract, there is the element of discrimination. Accordingly, in the situation outlined above, the breach of the duty of co-operation might result in any dismissal being held to be unreasonable.

#### Situation 2

As in situation 1 except that the employee does not resign but is dismissed. The employer alleges that the desirability of uniform adhesion to the collectively agreed terms amounts to "some other substantial reason". The employee alleges that even if that is true the dismissal is unfair due to the element of inequitable treatment. The sole difference between the two situations is that one involves constructive dismissal and the other involves dismissal by the employer. It is submitted that the result in either situation should be the same.

#### Situation 3

An employer may submit that there is a custom that terms and conditions of employment are determined by collective bargaining. It is important to remember that "A custom or usage can only be incorporated into a contract if there is nothing in the express or necessarily implied terms to prevent such inclusion ..." <sup>17</sup> Prima facie there is no inconsistency between the implied duty of mutual trust and confidence and a custom whereby employment contracts are automatically varied as a result of changes in collective agreements. (On the other hand, might it be unreasonable to incorporate such a custom which creates an "... apparently open-ended commitment of the employee to accept new negotiated

terms"?<sup>18</sup> What, though, if a particular variation negotiated by the union capriciously, etc, discriminates against an individual? Would there be any breach of the duty of co-operation? The difficulty flows from the continuing nature of the employment relationship and the consequence that the terms of the bargain are not static; any inconsistency may emerge at a subsequent date. One possibility, to deal with the special nature of the employment relationship, is to extend the rule that "... a custom may not be proved if it would be inconsistent with ... an implied term". One could say that particular applications of a custom could not stand in the face of the implied duty of co-operation.

In cases of constructive dismissal it would be essential to show that the operation of such a custom was subject to the implied duty of co-operation. In the absence of such an implied duty an employee would not be able to point to a repudiation of the employment contract and hence any resignation would not amount to a dismissal.

On the other hand, were the employer to dismiss the employee the situation would be basically the same as situation 2.

#### Situation 4

What if the contract expressly stipulates that the terms of the contract are to be as laid down in a collective agreement as varied from time to time? Would it be open to the courts, in the absence of express words to the contrary, to hold that any express term as to variation was subject to the implication that it would not encompass variations which unjustifiably discriminated against



employees? The difficulty is that "where the employer retains a prerogative power on traditional contract principles he cannot be in breach of the contract to exercise that power as he wishes, however arbitrarily or unreasonably that exercise may be ...".<sup>19</sup> On the other hand, "Potentially the implications of ... (Gardner Ltd v Beresford)<sup>20</sup> ... are of considerable significance, for the decision suggests that even the exercise of clear and explicit prerogative powers can constitute a repudiation of the contract if they are employed in a discriminatory or victimising manner. It is but a short step to argue that the employer is under a duty not to exercise his prerogative powers in a long employment relationship ...".<sup>21</sup> Should the employer be under such a duty the possibility of a constructive dismissal situation will arise if he breaks it. Bristol Garage is an analogous case concerning through an implied term in fact rather than in law.<sup>22</sup> There "although there was a term in the respondent's contract of employment as a forecourt attendant imposing a liability on her for a proportion of any cash shortages arising whilst she was on duty, it was necessary to imply a term limiting the expressed absolute liability so as to exclude losses caused by dishonesty."<sup>23</sup> In any event any dismissal by the employer in the face of an employee's refusal to abide by new contractual terms might be held to be unreasonable.

### Redundancy Dismissals

S 59 enacts that it will be automatically unfair to select an employee for dismissal in contravention of an agreed procedure relating to redundancy, in the absence of special reasons justifying a departure from the procedure. One consequence has been that where employees are selected for redundancy and the

agreed procedure is followed it will be difficult to show that the dismissal was unfair.<sup>24</sup> This is despite the fact that it is open to an applicant to seek to argue that the procedure is inherently unfair and hence that the dismissal is unreasonable by virtue of s 57.<sup>25</sup> Should an employer select an employee for redundancy in breach of procedure, *prima facie*, the dismissal would be automatically unfair. If the procedure unreasonably discriminated against an employee would that amount to a special reason justifying a departure from the procedure?

#### A Duty of Fair Representation

Such a duty is borne by trade unions in the U.S.A. and involves '... the active and yet even-handed upholding of a worker's interests by a trade union vis-a-vis an employer in the course of collective bargaining or consultation or in the profession of an individual grievance or dispute involving the worker.'<sup>26</sup> We have already noted that s.12 of the Sex Discrimination Act 1975 and s.11 of the Race Relations Act 1976 obliges unions to avoid sex or race discrimination in the provision of facilities or services.

Hitherto, the UK judiciary have not shown any inclination to imply such a duty into the contract of membership. Elias et al, have expressed the view that "it is possible that the duty to act fairly as expounded in Breen (v Amalgamated Engineering Union) would be applied to circumscribe union officials' actions which were capricious, vindictive or deliberately discriminating towards an individual member".<sup>27</sup>

Were such a duty of fair representation to exist its operation

would pose a number of difficult questions. In the context of the negotiation and administration of collective bargains the duty essentially involves controlling the discretion of trade unions. One might question whether the courts would be the body best equipped to perform the necessary balancing of individual and collective interests and, indeed, balancing competing collective interests. It would seem valuable, however, to examine more closely the US experience in this field. The DFR was created by the Supreme Court in the case of Steele.<sup>28</sup> There the Railway Labor Act granted the relevant trade union (the Brotherhood) exclusive bargaining rights; an application was then brought by a negro employee who along with all other negroes was ineligible to join the union but who was required to accept that the union bargain on his behalf. A new collective agreement was entered into which benefited white employees at the expense of the black employees. In holding for the petitioner the US Supreme Court placed considerable store on the fact that black employees were not members of the brotherhood or eligible for membership. The Court felt the corollary of this was that the union's authority to act derived not from the employees' action or consent but wholly from the RLA. The union was thereby under a duty '... to represent non-union or minority union members ... without hostile discrimination, fairly, impartially and in good faith'.<sup>29</sup> On the other hand, discrimination per se was not regarded as being illegitimate; certain distinctions would justify differential treatment.<sup>30</sup>

A fascinating feature of the DFR is the tension between the protection of individual/minority interests and the danger of

excessive interference in trade union internal affairs. One may begin by considering the procedural restraints that the courts have sought to place on a union's bargaining practices. It was suggested in Steele itself that, on occasion, the DFR would require the union '... to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action'.<sup>31</sup> In Warehouse Union, Local 860 v NLRB the union failed to advise its membership of prior threats of job losses if wage increases demanded during negotiations were granted. The failure to warn was said to amount to '... an arbitrary action and constituted a breach of duty'.<sup>32</sup> In Branch 6000, National Association of Letter Carriers v NLRB non-union members were denied a vote in a ballot to determine terms and conditions of employment.<sup>33</sup> It was held that '... the vote based on the individual preferences of the union members, without any consideration of the interests of the non-union employees ...' constituted a breach of the DFR.<sup>34</sup>

If a DFR were to be introduced in the UK there must, at least, be a possibility that some procedural requirements would be placed on trade unions in bargaining. At a general level one might suggest that this would be likely to prove costly, time consuming and, probably in addition, lead to a loss of flexibility. At present trade unions refer back collective agreements to their membership before signing in a large number of cases. This is done to a much greater extent than would be suggested by a perusal of union rule-books.<sup>35</sup> Perhaps what is most striking is the wide variety of practices both within and between unions. An injection of

legalism might lead to an unhealthy rigidity. It will be recalled that the hallmark of the IRA's intervention into trade union internal affairs was a lack of understanding of the differing requirements of different trade unions.<sup>36</sup>

One might also speculate as to what any procedural restrictions might entail. This to a large extent might depend on whether a UK DFR flowed from a general duty of fairness or from a specific and detailed legal code. If the former position were to be adopted trade unions would be at the mercy of the adjudicating body though greater flexibility would exist to meet differing circumstances. Utilising the latter option might result in a number of positions ranging, for example, from a duty to inform members to a duty to ballot.

A number of US commentators place some importance on a procedural standard being part of the DFR. This appears to flow from the view that the imposition of procedural restraints results in an acceptable compromise between preserving trade union autonomy and protection of minority interests. It would, for example, be said that simply by being forced to take account of conflicting interests a trade union is more likely to reach a fair decision. However, there may be an inherent flaw in reliance on a procedure-orientated DFR since it can be argued that procedural restraints do not necessarily lead to a fair resolution of any conflict of interest. If a DFR is to have any real effect it may on occasion have to interfere with the substance of a trade union decision. The danger then being that trade union autonomy will be restricted to too great an extent.

In the US the DFR has most commonly been seen as involving the striking down of union actions based on impermissible motives. Steele requiring unions to act '... with hostile discrimination, fairly, impartially and in good faith'. A number of issues arise from this motive based approach. First, identifying categories of improper motives is by no means an easy task. There would probably be a general consensus that discriminating against an individual/group on the grounds of sex or race is improper. Again acting out of personal malice would be improper. Beyond this it becomes more difficult to denote any other general categories. One U.S. court has offered the view that 'The phrase "duty of fair representation" is a legal term of art incapable of precise definition ... There is no code that explicitly prescribes the standards that govern unions in representing their members in processing grievances. Whether a union breach is duty of fair representation depends upon the facts of each case ... But pronouncements made from time to time by the supreme court, articulating the somewhat hazy contours of the union's obligations, do furnish a measure of guidance.'<sup>37</sup>

If the difficulty in identifying general categories of improper purpose is viewed as a barrier restricting the operation of the DFR one must also consider the very nature of collective bargaining. The demise of individual bargaining means that most employees will be in a stronger bargaining position and this should be reflected in their employment terms.<sup>38</sup> On the other hand, while some employees may be disadvantaged this is regarded as an inevitable and acceptable consequence. The view is sometimes then taken, though this need not follow, that collective decisions should



generally be based on the vote of a simple majority. Proponents of this view will envisage a limited role for the DFR. Conflicts of interest become much more of an internal trade union affair. It has been said that '... the rule of the majority is the only solution, for all a union can hope to do is serve the best interests of the greater number of its members ...'.<sup>39</sup>

As the case of Steele itself recognises certain differences between members will permit a trade union to discriminate between then when bargaining with an employer. The examples of relevant grounds for a differential treatment given in Steele were '... differences in seniority, the type of work performed, the competence and skill with which it is performed ...'.<sup>40</sup> Differential treatment which is based on factors which are regarded as irrelevant to a union's role in collective bargaining may be held to constitute a breach of the DFR. The criteria which indicate whether any variation is based on relevant grounds tend not to be explicit. Apparently a relatively low number of DFR cases have been decided on the basis of relevancy and such cases probably tend to turn on their own facts. According to Finkin whether a distinction is permissible '... turns upon a consideration of industrial practice, the expectations of the employee community, and the moral standards of the larger community'.<sup>41</sup> The use of 'relevancy' might be viewed as an attempt to expand the categories of impermissible motives. By seeking to define proper industrial motives the courts seek to exclude actions otherwise motivated. A recent illustration is provided by Conrad v Delta Air Lines where the collective agreement provided that the right, stated in the agreement, not to be dismissed without investigation and hearing, is not enjoyed by



probationary pilots.<sup>42</sup> Such differentiation was held to be acceptable: 'The rationality of an employer's having greater freedom to discharge during a probationary or testing period seems obvious. It is not the type of hostile discrimination against a group of employees which would lie beyond the proper scope of a collective bargaining agreement.'<sup>43</sup> Moreover, the US case law acknowledges that the very nature of bargaining demands that trade unions be given a substantial measure of discretion. So, for example, 'Compromises on a temporary basis, with a view to long range advantages are natural incidents of negotiations.'<sup>44</sup>

One striking feature of the development of the US case law is the trend towards greater intervention. *Steele* required unions to act '... without hostile discrimination, fairly, impartially and in good faith'. Two subsequent cases were to treat this as involving a somewhat narrow standard. Thus *Huffman* held that 'a wide range of reasonableness must be allowed a statutory bargaining representative in serving the writ it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion'.<sup>45</sup> This approach was followed in *Humphrey* where the petitioner failed since there was '... no substantial evidence of fraud, deceitful action or dishonest conduct'.<sup>46</sup> The decision of the Supreme Court in 1967 in *Vaca v Sipes* saw a move to greater intervention.<sup>47</sup> *Vaca* regarded the DFR as tripartite: '... a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct'.<sup>48</sup> The key point is the attack on arbitrary conduct; *Vaca* '... imposes an affirmative obligation to give some reason for

the Union's actions'.<sup>49</sup> Once reasons must be given judicial scrutiny becomes easier and union autonomy in decision-making is more likely to be restricted.

The desire for greater intervention has led to calls that unions adhere to a process of rational decision-making. Clark has stated that '... instead of reviewing the union's choice of alternatives for reasonableness or fairness, the courts should review the union's decision-making process. If the union gave fair consideration to the complaining employees' interests and based its decision on rational factors, the court should not interfere. Otherwise, the union has failed to represent all the employees, and the injured workers should have some relief'.<sup>50</sup> To a certain extent requiring rational decision-making merely re-imposes traditional requirements in a new form. Thus some courts might simply look to a union's motives or to the procedures followed in any assessment of rationality.<sup>51</sup> However, the potential exists for a review of the substance of the union's reasoning. In Branch 6000 it was held that the DFR required that the interests of all employees be ascertained and taken into account. The views of the minority could be rejected, however, so long as there was a rational argument for doing so. The approach in Branch 6000 might suggest that the US courts will require a union decision to lie within a band of reasonableness.<sup>52</sup> One is then not far away from a position whereby the courts would decide what decision they would have made in the circumstances rather than what a responsible union would have decided. Certainly one might, at least, argue that '... there must be a substantive component to the seemingly procedural requirement that the union 'adhere to rational decision

making processes'.<sup>53</sup>

One factor which does not seem to have received much attention in the US literature is the question of employer bargaining power and the extent to which this restricts a trade union's ability to strike the bargain it desires. Harper and Lupu suggest that '... whenever a union defends a DFR claim by asserting that it agreed to sacrifice some employees' interests simply because of employer bargaining power, rather than on a basis of principle the union would have embraced in the absence of employer pressure, tribunals should carefully review the credibility of the union's assertion'.<sup>54</sup> However, in many cases it would be extremely difficult to allot responsibility between an employer and a union for the creation of discriminatory terms.

It is clear that US experience suggests no easy solutions when it comes to testing whether a trade union's bargaining practices fairly resolve competing interests. The DFR functions best when it strikes down trade union actions which flow from certain specified improper motives (eg racial discrimination). Beyond this some courts look to certain procedural requirements as a way of promoting fair representation. Such requirements in no way guarantee a result which is fair in substance but nevertheless a union may be put to a great deal of expense and inconvenience. Moreover, the DFR, as developed by the US courts, fail to offer clear guidelines to unions. Finally, the development of the doctrine seems to have been marked by an increasingly interventionist approach. An alternative to placing a duty of fair representation on trade unions would be to place some duty on the

employer. While it might seem that the trade union is the obvious body to proceed against the position is more complicated. It is interesting to consider Donovan's recommendations in the situation "... where an employer dismisses an existing employee who refuses to join a trade union following the introduction of the closed shop". The Commission expressed the view that "... the employee should be able to succeed against the employer so long as he can show that he has reasonable grounds for refusing to join the union. It is the responsibility of the employer in conducting a closed shop agreement to bear in mind the interests of existing employees who are not in the union and ensure that they are adequately safeguarded ... It might be argued that this is unjust, since it is the union, not the employer, which stands to gain from an insistence on an employee's being in the union, but the decision to dismiss is the employer's taken ultimately because he considers it to the advantage of his business.'<sup>55</sup> Similarly, one might argue that an employer who wishes to regulate employment terms by means of collective bargaining should be prepared to compensate employees who suffer damage because of discrimination.

Such a duty would be aimed at protecting an employee against a change in his contractual terms, resulting from a collective bargain, which unreasonably discriminated against him. Where the breach of duty was a minor one a claim for damages might be allowed; in more serious cases a claim for constructive dismissal should be allowed.

Summary

Collective bargaining is a major source of employment terms for many workers. Contract law and the law of unfair dismissal will often combine to effectively bind the employee to any collectively agreed variations. Some protection is already offered by the Equal Pay Act etc. Discrimination may take place on other grounds, however, and it deserves to be considered to what extent the implied duty of co-operation might assist the employee. More fundamentally it is worth discussing whether some equivalent of the US duty of fair legislation should exist and whether such a duty might be borne by the union or the employer.

CHAPTER 8: THE VARIATION OF COLLECTIVELY AGREED TERMS  
FOOTNOTES

- 1 O Kahn-Freund, Labour and the Law, 2nd edn, p 133.
- 2 [1983] ICR 351 at 358.
- 3 Eg Land v West Yorkshire Metropolitan County Council [1979] IRLR 174.
- 4 See N Lacey, 1987 Vol 16, ILJ 48.
- 5 [1982] IRLR 131.
- 6 [1975] IRLR 139.
- 7 [1976] IRLR 84, 85.
- 8 [1976] IRLR 84, 86.
- 9 Gray Dunn & Co v Edwards [1985] IRLR 23 at 24.
- 10 [1982] IRLR 142.
- 11 Ibid at 145.
- 12 [1983] IRLR 311, 312.
- 13 Hepple and O'Higgins, Employment Law (4th edn) p 135.
- 14 [1978] IRLR 63 at 64.
- 15 P Elias, 1978 Vol 7, ILJ 100 at 102.
- 16 For a discussion of the US Duty of Fair Representation see below p 249 et seq.
- 17 Chitty on Contracts; General Principals, 24th edn, para 796.
- 18 Elias, Napier, Wallington, Labour Law: Cases and Materials, p 409.
- 19 P Elias, 1978, Vol 7, ILJ 100 at 103.
- 20 [1978] IRLR 63.
- 21 P Elias, op cit, 1978 ILJ 100 at 106.
- 22 Bristol Garage (Brighton) Ltd v Lower [1979] IRLR 86.
- 23 Ibid.
- 24 Valor Newhome Ltd v Hampson [1982] ICR 407.
- 25 Bessenden Properties Ltd v Corness [1977] ICR 821 (Note).

- 26 Davies and Freedland, Labour Law Text and Materials (1st edn), 587.
- 27 Elias, Napier and Wallington, Labour Law: Cases and Materials, p 350.
- 28 Steele v Louisville and Nashville Road, 323 US 192 (1944).
- 29 Ibid at 203-205.
- 30 Steele, op cit, at 201-203.
- 31 Steele, op cit, at 203-205.
- 32 652 F 2d (1981) 1022 at 1025.
- 33 595 F 2d (1979) 808.
- 34 Ibid at 809.
- 35 R Undy and R Martin, Ballots and Trade Union Democracy, pp 118-120.
- 36 Weekes et al, Industrial Relations and the Limits of the Law, Ch 3.
- 37 J P Clark, The Duty of Fair Representation: A Theoretical Structure, 1973 Tex L Rev, Col 51, 1119 at 1121.
- 38 See J I Case v NLRB 321 00 332.
- 39 M W Finkin, The Limits of Majority Rule in Collective Bargaining, 1980 Minnesota Law Review, 203 at 205.
- 40 Steele, op cit. See also, Ford Motor Co v Huffman (1953) US 330.
- 41 Finkin, op cit, 223.
- 42 494 F 2d (1974) 914.
- 43 Ibid at 916.
- 44 Ford Motor Co v Huffman (1953) 345 US 330 at 338-340.
- 45 Ibid.
- 46 Humphrey v Moore (1964) 375 US 370 at 381.
- 47 386 US 171 (1967).
- 48 Ibid at 850.
- 49 R A Gorman, Basic Text on Labor Law, p 714.
- 50 J P Clark, The Duty of Fair Representation: A Theoretical Structure, 1973 Tex L Rev, Vol 51, 1119 at 1132.



- 51 Clark, op cit, at 1137.
- 52 Branch 6000, National Association of Letter Carriers v NLRB,  
594 F 2d 808 (1979).
- 53 N W Finkin, The Limits of Majority Rule in Collective  
Bargaining, 1980 Minnesota Law Review, 203. Cf p 200, n 83.
- 54 M C Harper and I C Lupu, Fair Representation as Equal  
Protection, Vol 98, Harvard Law Review (1985), 1212 at  
1269-70.
- 55 Royal Commission on Trade Unions and Employers' Associations,  
Cmd 3623, para 564.

## CHAPTER 9

### ADJUDICATION

In this chapter it is proposed to discuss a number of issues connected with the solving of disputes concerning collective agreements. It is suggested that a convenient starting point would be to consider the difficulties which the adjudication of collective agreements is said to present. First, a number of problems are produced by virtue of the fact that the collective parties are, on occasion, so anxious to come to an agreement that the wording of particular clauses intentionally does not resolve actual disputes. Thus where agreement on a particular matter is proving elusive the parties may draft a clause which is sufficiently ambiguous as to postpone the resolution of the issue to a subsequent date. Again one party may suspect that the wording of a clause is inadequate but declines to seek clarification due to fear that the issue would be resolved in favour of the other side. Should a change in the balance of power of the bargaining parties subsequently take place the issue may be brought up. Second, as is often pointed out, a collective bargain regulates a continuing relationship. One consequence is that it is impossible to anticipate every circumstance that may arise. As a result certain matters may not be provided for at all, in other cases, it may be questionable whether a particular clause was meant to govern a situation which has arisen. Third, the form of the agreement must be considered. Unwritten understandings may exist in addition to any written agreement. It will also be asserted that written agreements can only be understood when any custom and

practice is taken into account. Again 'Though the subject matter is complex and the provisions intricate, the language must nevertheless be directed to laymen whose occupation is not interpretation ...'<sup>1</sup> Fourth, the magnitude of the role performed by collective bargains has to be remembered. They govern the working relations of many people and cover a wide range of often complex matters. Fifth, the nature of the particular industry concerned must also be taken into account. Thus in some industries the rate of technological change is very rapid. This can result in the need for frequent revision of agreements. It can also result in particular difficulties from applying existing provisions to changed circumstances. A further difficulty is discussed by Cox: 'In the case of a statute the best guide to ... meaning is its policy or purpose. Behind the words there usually lies a general aim, an objective, which embodies specific meanings, half-understood, half-inarticulated; and by these one may judge specific cases ... Many questions of interpretation can be handled in this fashion under collective bargaining agreements. The most ambiguous phrase may be directed to a practical problem, and it is an obvious mistake to read the words without attention to the problem ... Unfortunately, many of the most important questions of interpretation are not soluble by reference to the fundamental purposes of the collective agreement - at least not in the sense in which that term is usually understood. The difficulty arises from the fact that management and labour often have conflicting aims and objectives, and the interpretation put upon the contract may depend upon which objective is chosen as the major premise'.<sup>2</sup> Disagreement as to purpose must also be a common feature of contracts of many types.

### Appropriate Forum

An issue which raises a large measure of difficulty is the question of who should arbitrate or adjudicate on conflicts of right arising out of collective agreements. The traditional courts are often portrayed as a body not best suited to handling labour disputes. This view arises because of the perceived characteristics of the traditional courts and rival bodies. It is proposed to continue discussion by reviewing those characteristics and then to consider the approach adopted in a number of cases.

### Industrial Relations Expertise

When the courts become involved in Labour Law adjudication their decisions are often criticised for failure to take sufficient account of the exigencies of industrial relations. It must, however, be remembered that the industrial relations knowledge of other bodies will vary. Thus the wing members of an industrial tribunal will both have knowledge of the practice in their respective trades/industries. However, neither may have any particular knowledge of the trade which is relevant to the case before them.<sup>3</sup> Again in the United States where there is an on-going debate as to the respective merits of permanent and temporary arbitrators, one advantage of the former is that he '... becomes familiar with the provisions of the parties' agreement. He comes to know the day-to-day relationships of the parties, their circumstances, their personalities, and their customary practices'.<sup>4</sup> Moreover, it has been agreed that 'The most successful arbitration is that which set a smooth course for future operations. Thorough knowledge of the past relationship of the parties is an invaluable aid to one who would pursue this end.'<sup>5</sup>

One may note that Marsh has gone as far as saying that 'if an issue involves the application or interpretation of an existing agreement, only the parties at the level at which the agreement was made can logically say how it should be applied or interpreted.'

It should be said though that, even in the absence of any knowledge of a particular trade or industry, certain bodies will have much greater general experience of industrial relations problems.

#### Approaches to Interpretation

Whether one is interpreting a statute or a contract there will always be differing views as to the most apposite approach to interpretation. Put crudely, there will be a tension between 'creative' and 'literal' approaches. Cox has written 'The tendency to be literal is often enhanced by lack of familiarity with the subject-matter. Judges - and sometimes lawyer-arbitrators - are tempted to take refuge in the literal meaning of language when they fail to understand the industrial problem ...'<sup>7</sup> Nevertheless, there are constraints on those adopting a creative approach and one might also query as to how often a difference in approach leads to a different result. One instance where a creative approach is said to be beneficial is where a situation arises which was not foreseen during negotiations and for which the collective agreement makes no provision or inadequate provision. On some occasions a 'creative' adjudicator would feel able to extend the agreement to resolve the difficulty; on other occasions he would not. The perceived proper limits of creativity are extremely nebulous. Shulman has expressed the view that in matters of labour arbitration 'The effect on efficiency,

productivity and cost are important factors to be considered. So are also the effect on the attitudes and interests of the employees... Practicality of the interpretation in its day-to-day applications is a related value'.<sup>8</sup> It must be said that irrespective of who is adjudicating there will inevitably be great reluctance to adopt the role of an arbitrator in an 'interest' dispute.

### Issue of Opinions

Arbitrators may prefer not to give reasons for their decisions. This was the practice of the Industrial court and was defended in the following manner: '1. The award is intended to put an end to the dispute and not to prolong and exacerbate the difference. This, it is feared, would be the result if the parties were given the reasons for the award to argue over. 2. The effect of giving reasons would be to build up a body of case law which might lead to a more rigid treatment of disputes. 3. Sometimes the members of the Court come to the same conclusion for different reasons, and the authority of the award would be lessened if this were revealed.'<sup>9</sup>

In response to the third point, one might suggest that the view expressed is unduly negative. In any event, since the above statement was issued we have witnessed the advent of unfair dismissal. It is seldom suggested that the possibility of majority decisions in that area of law has weakened the authority of industrial tribunals. The second point is, in substance, an attack on any extension of the judicial doctrine of stare decisis. However, prior awards can be used in a much more flexible way (see below). Finally, it is argued that issuing opinions can '...

prolong and exacerbate the difference'. However, equally it might be suggested that issuing an award unaccompanied by reasons might be a cause of further strife. It is interesting to note that the CAC now issues '... an indication of the considerations which led to the award'.<sup>10</sup> This perhaps indicates that the style of 'judgment' is what is important. Any award which seeks to attribute blame is undesirable.

The question of whether an opinion should be issued is obviously closely related to the much more important issue of the status of previous decisions. One's view as to the latter issue will carry in its sway the former.

### Precedent

The British courts are generally regarded as following a rather rigid doctrine of precedent. This approach might be thought to be unsuited in the industrial relations context. Both management and labour might seek a flexible approach whereby previous interpretations of collective agreements could be disregarded where their utility had been lost. An initial point to make would be that the treatment of precedent by certain traditional courts outwith the UK is markedly different. Secondly, reference to past decisions can be valuable without there being any question of the adoption of a rigid version of stare decisis. Indeed, where industrial relations are involved previous awards are likely to serve as mere guidance. There can be considerable variation in the approach adopted by different bodies/individuals. For example, one American arbitrator has stated that he would not follow a previous award in any one of the following circumstances:



(1) The previous decision clearly was an instance of bad judgment; (2) the decision was made without the benefit of some important relevant facts or considerations; or (3) new conditions have arisen questioning the reasonableness of the continued application of the decision."<sup>11</sup>

Reference to previous decisions can have a number of benefits. When the parties seek to interpret a particular provision they can be guided by any earlier interpretations. Moreover, a measure of consistency is probably expected by all parties involved. Even where there is no previous decision directly in point earlier decisions may suggest useful approaches to problems.

#### Rules of Evidence

It is obvious that bodies other than the traditional courts will not apply the strict judicial rules of evidence. Nevertheless, every adjudicator will obviously impose some rules of evidence. Arbitrators in the United States have regard to a very detailed body of rules in respect of this matter. Thus the hearsay and parole evidence rules may be retained, albeit in a simplified form.

#### Implication of Terms

In the construction of any document the use of the doctrine of implied terms can be very important. This might be thought to be particularly so when the source of the contractual term sought to be implied is custom and practice. Custom and practice is generally regarded as being of great significance in the industrial relations context. Nevertheless, its existence poses difficulties for adjudicators. Often there is widely conflicting evidence as

to what was in fact done in the past. "Ascertaining the facts with respect to an alleged practice is a difficult task ... But even after the facts are ascertained, what is their significance? When do they add up to a practice? And what practice?"<sup>13</sup> Once again the task involved is often thought to be best done by a body other than the traditional courts. The arguments involved are very similar to those involved when approaches to interpretation and knowledge of industrial relations are discussed.

In the US many arbitrators adopt the view that "In the absence of a written agreement, 'past practice', to be binding on both parties must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties".<sup>14</sup> This is a fairly rigorous test and again illustrates that the approach of bodies outwith the traditional courts is often not too dissimilar. The fact that collective agreements are a major source of the terms of individual employment contracts means that, in practice, the courts and tribunals frequently deal with such agreements. It is important, therefore, to consider the experience of the courts and tribunals in this area: for two reasons:- firstly, to examine the appropriateness of these bodies as adjudicators and, secondly, to see what difficulties collective agreements have caused. In 1978 nearly 80% of full-time manual male workers were affected by collective agreements.<sup>15</sup> That considered, it is surprising that cases where a question concerning a collective agreement is at issue are relatively infrequent. Of course, a number of cases concern the theoretical basis for incorporating collective terms into the individual contracts.

Such cases, though, shed no light on any difficulties involved in the enforcement of collective agreements, nor indeed on the actual application of collectively derived contractual terms. On the other hand, problems such as the vagueness of language, said to be inherent in the enforcement of collective agreements, have not been the cause of much argument.<sup>16</sup> This is not to suggest that collective agreements never pose problems. In Scott v Formica Ltd<sup>17</sup> the IT commented that "the evidence of this agreement ... is extremely sketchy ... neither the employer nor the union could say exactly when the agreement was reached nor did anyone expound its exact terms". It is said that interpreting collective agreements would be "... a major headache". Moreover, "this would also apply to the interpretation of collectively agreed terms incorporated in contracts of employment".<sup>18</sup> Reported cases involving difficulties of interpretation of collectively derived terms do not appear to be common. One such case was Turriff Construction Ltd v Bryant<sup>19</sup> - where the question was whether a site agreement should be interpreted so as to require compulsory overtime. The question was a difficult one - the wording was inadequate, inconsistent, unclear, and in places aspirational. The style of the agreement, therefore, gave the court a wide measure of discretion - and in holding overtime was not compulsory they were able to follow a trend whereby "the tribunals and courts have leaned heavily in favour of saying that local overtime arrangements to "co-operation, not contract"".<sup>20</sup> In a later case<sup>21</sup> the court was troubled by like difficulties. They reached the somewhat surprising decision that overtime was not obligatory though it had been agreed "... that the employers have the right to decide when overtime is necessary" and in the event of disputes "the overtime required

shall be proceeded with" while the dispute is processed.<sup>22</sup> So where difficulties of interpretation do present themselves they would appear to permit a highly discretionary role by the adjudicator.

When faced with such difficulties what can be said of the approach of the adjudicatory body? On occasion the IT has shown itself prepared to reject a literal interpretation in favour of a "sensible construction" which took account of the needs of the firm - a last in, first out, redundancy procedure was held to be applied by reference to types of employment.<sup>23</sup> In another case the mobility clause of the relevant Working Rule Agreement provided that '... at the discretion of the employer, an operative may be transferred at any time during the period of his employment from one job to another.'<sup>24</sup> The tribunal in McCulloch v Moore held that this clause meant only transfer to some other accessible job in the locality.

In another case, the Working Rule Agreement provided that '... the employer shall have the right to transfer to any site within daily travelling distance of where the operative is living'.<sup>25</sup> The tribunal sought to give a '... sensible and intelligible construction' to the rules.<sup>26</sup> A term was implied, based on the reference to 'daily travelling distance', 'that the distance is to be such a distance from the operative's home as he can reasonably be expected to travel backwards and forwards each day'.<sup>27</sup> What would be reasonable in the circumstances of the case? The tribunal found a solution by looking to related provisions in the working rule agreement.

It is not every style of interpretation which allows for the expression of the workforces interests. In GEC Machines Ltd v Gilford<sup>28</sup> the EAT set aside the first instance decision to look "to the spirit of the agreement" and limit the employer's discretion under a redundancy scheme though more recently, in Bond v CAV Ltd<sup>29</sup> the High Court held that a lay-off agreement "was intended to suspend (guaranteed employment) only where no work was available for a particular employee. It was not intended to give an employer a general right of lay off wherever he could point to some dislocation of production by reason of an industrial dispute".<sup>30</sup> The collective agreement stated that: "In the event of dislocation of production in a federated establishment as a result of an industrial dispute ... the operation of the period of the guarantee shall be automatically suspended".<sup>31</sup> The agreement was, therefore, not interpreted literally but was construed as being subject to the aforementioned indication.

At the end of the day interpretation has not been "a major headache".<sup>32</sup> Indeed, of late the EAT has positively encouraged resort to collective agreements as a source of employment terms.<sup>33</sup>

Successful adjudication of collective agreements is dependent not just on the industrial relations knowledge of the adjudicator but also on the ideology of that adjudicator. British Leyland UK Ltd v McQuilken illustrates the difficulty.<sup>34</sup> There a redundancy agreement was held by the EAT to be inappropriate for incorporation on the grounds that the "... agreement was a long-term plan, dealing with policy rather than the rights of the individual employees".<sup>35</sup> I would suggest that this is no justification for

denying the agreement normative effect at individual level. It is merely a device to re-write the bargain to increase managerial prerogative. The decision demonstrates very much a "unitary" view of the employment relationship.

Cadoux v Central Regional Council provides a further illustration.<sup>36</sup> There the employment was '... subject to the conditions of service laid down by the National Joint Council for Local Authorities Administrative Professional, Technical and Clerical Services ... and as supplemented by the authorities 'rules and as amended from time to time'.<sup>37</sup> It was held that the "... words 'as supplemented by the authorities' rules' in the contract of employment ... are sufficient to incorporate ... the whole of the provisions in the rules ...".<sup>38</sup> One of the rules provided for a non-contributory life assurance scheme. The employers subsequently unilaterally withdrew the scheme. Despite the holding that the rules were incorporated it was held that the employers were contractually entitled to do this. This seems surprising. Having treated the scheme as contractual a variation of the rights given would presumably require consent. Attention was drawn to the following term of the rule: 'Any future changes in the terms will be entered in these documents or otherwise recorded for you to refer to within one month of the change'.<sup>39</sup> Lord Ross went on to state that 'No machinery for making changes is provided and, ... the inference must be that the ...[employers] ... can make such changes as they like provided that they enter them into those documents ... [etc.] ...'.<sup>40</sup> It is respectfully submitted that this inference does not follow and that there is nothing to suggest that the normal contractual rule, whereby variation of terms requires mutual consent, does not apply. One



is left feeling that the criticism levelled at McQuilken could be applied to Cadoux.

In Duff v Taylor Woodrow Construction Ltd<sup>41</sup> a working rule agreement contained the following statement: 'it is the intention of the management to continue the present arrangement of working alternative Saturdays but it must clearly be understood that the management reserve the right to vary from this agreement where special circumstances apply'.<sup>42</sup> The tribunal concluded that this was '... clearly a statement not of any agreement reached between parties but is no more than a statement of the unilateral intention of the management'.<sup>43</sup> One might hazard the view that the tribunal were too ready to conclude that the statement had no contractual force. The use of the word 'agreement', set against a background of a working rule agreement intended to furnish individual contractual terms, might be thought to go towards the view that the statement was contractual. Management would then be able to vary the agreement only where special circumstances existed. Admittedly the use of the term 'special circumstances' would arguably make the obligation too vague to be enforceable: on the other hand, one wonders what approach the CAC might have taken (see below p 279 et seq).

A further issue concerned with adjudication is the industrial relations expertise of the decision-makers, a common criticism of the courts being that they lack knowledge and understanding of the practice of industrial relations. Thus on a number of occasions the courts have confused the question of the legal status of collective agreements between the collective parties with the



question of incorporation into the individual contract of employment. In Loman<sup>44</sup> the issue turned on the relationship between a national and a local agreement. The court denied normative effect to the local agreement because it was "adopted as a gentleman's agreement". This dubious conclusion was justified by the assertion that "if locally legally binding agreements were made departing from The National Agreement, it would undoubtedly create demands for a complete overhaul of The National Agreement".<sup>45</sup> This statement demonstrates a complete ignorance of the collective bargaining process - the developments in Britain's dual system of industrial relations were decidedly outwith judicial knowledge.<sup>46</sup>

The recent decision of the EAT in Marley V Forward Trust Group must also be considered.<sup>47</sup> There an employment contract incorporated the terms of a collective agreement; clause 11 of that agreement stated "This agreement is binding in honour only and it is not intended to give rise to any legal obligation". At first instance, the industrial tribunal had held that, although the terms and conditions of the collective agreement were incorporated, the incorporated terms were legally unenforceable because of clause 11. This is extraordinary. The IT had expressed the view "... that clause 11 was incorporated in this agreement in order to enable the employees and the union to respectively retain flexible positions in the event of potential or actual redundancies".<sup>48</sup> The EAT rightly regarding this proposition as being somewhat unlikely believed that clause 11 "... stems almost certainly, historically, from the TULRA 1974 or probably the IRA 1971 when the unions were anxious not to find themselves in litigation in court".<sup>49</sup> However, the EAT upheld the IT despite the fact that "... it can be

nothing but bad for industrial relations in so far as it relates to an individual agreement they should be bound in honour and not by law then, in honour, they have not honoured the agreement ...".<sup>50</sup>

The foregoing reveals a situation where the IT and the EAT, specialist bodies in the Labour Law field, made the sort of fundamental error which, had it been made by the traditional courts, would have been regarded as evidence of the latter's unsuitability in this field. It was, in fact, left to the Court of Appeal to overturn those decisions.<sup>51</sup>

Similar difficulties of expertise arise when one looks at the question of appropriateness of terms for incorporation into the individual employment contract. The approach of the courts has, on occasion, demonstrated a failure to understand the realities of collective bargaining. One example of this is the case of Camden Exhibition and Display Limited v Lynott<sup>52</sup> (see above, p 192).

Of course the approach of the courts can make allowance for the realities of industrial relations practice. In Burroughs Machines Ltd v Timoney<sup>53</sup> the Court of Session was called upon to translate the terms of a collective agreement into the individual contract. It will be recalled that the Court looked at the term in issue and asked, "would incorporation serve a plausible purpose?" The literalist approach of the IT and EAT was rejected.

Despite the normative import of collective agreements difficulties of interpretation are conspicuous by their absence. Custom and practice is also a source of terms of the employment contract. It

is also said to be an obstacle to enforcement of collective agreements. Cases where questions concerning custom and practice have arisen have not, on the whole, posed great difficulties.<sup>54</sup> On occasion, though, evidential problems have been pointed to.<sup>55</sup> In theory a custom will not be incorporated unless it is "reasonable, certain and notorious".<sup>56</sup> In fact, "the industrial tribunals and the courts simply do not in practice apply the sort of tests that the general principles of the law of contract impose as the criteria for binding customs".<sup>57</sup> This flexible approach might be thought to augur well for the handling of collective agreements and related practices though this flexibility means that the tribunals or the courts can often play a very creative role. Thus in one case where the employer claimed that payment of an allowance was discretionary the tribunal said "it would require very clear evidence to establish (such) a custom and practice".<sup>58</sup> Varying the evidential requirements can therefore be a means of giving the court a discretion as to establishing the terms of the contract.

The court's role in determining the existence and the content of custom and practice means that it is used to dealing with issues which, by their very nature, must be similar to those encountered in the enforcement of collective agreements. The fact that the tribunals and courts do not appear to have been overwhelmed by the difficulties is of interest. A word of caution should be sounded. Despite the importance of workgroup initiative in the creation of custom and practice<sup>59</sup> the extent to which the courts would accommodate rules which "are the product of management error and worker power" might be questioned. Moreover, since the "custom and

practice status of some practices only arises when they are challenged, questioned or broken"<sup>60</sup> this is obviously liable to be crucial. This prompts mention of Express and Star v Bunday<sup>61</sup>. There it was said that

"It was not custom and practice within the strict legal meaning of those words that the applicants only handled NGA approved material. It was loose custom maybe but the evidence of management which is accepted is that it has never been formally accepted. It has in the main been tolerated for a quiet life. It has been tolerated not only in this company but within the newspaper industry and there is no doubt that the applicants had reasonable expectations and hopes that it could continue. However it was a lawful order of management which the men refused to obey."<sup>62</sup>

Mention might also be made of the recent House of Lords decision in Hughes v DHSS<sup>63</sup>. The case centred on s.64 of the EPCA 1978. In Hughes while the contractual retiring age was 60, employees had a reasonable expectation of retiring at 65. The practice of a retiral age of 65 was regarded by the court as being non-contractual. Nevertheless, for the purposes of s 64, it would have been perfectly possible to regard the inducement of expectation as imposing an obligation on the employer. Instead of which the House of Lords held that a change in retiral policy by the employer nullified any existing expectations.

#### CAC Experience of Collective Agreements

It might be tempting to conclude from an examination of the experience of the courts and tribunals that the technical

difficulties encountered in adjudicating on disputes involving collective agreement are not as great as one might have thought. It would seem salutary though to look at the experience of the CAC in this area - given that "almost all the work of the CAC involves determining issues against the background of formal or informal collective agreements".<sup>64</sup> In operating the legal provisions relating to the extension of recognised terms and conditions the CAC dealt with many cases under Sch 11 Pt 1, 2(a)<sup>65</sup> alone. While the function of the CAC was not directly to enforce the "recognised terms and conditions" the awards are still of relevance since it is necessary to determine what the terms and conditions of an agreement are before you can say whether an employer is observing them. It is proposed, therefore, to examine the aforementioned awards to see what light they cast on the difficulties in adjudicating on collective agreements.

#### Problems of Interpretation

As the CAC has pointed out<sup>66</sup> "in deciding what constitutes recognised terms of employment" their function will often be "to interpret the meaning of the collective agreement". In the awards scrutinised difficulties of interpretation were far from being predominant.<sup>67</sup> This is to some extent surprising since one might have expected that one line of defence to an application to be a disputed point of interpretation, for example, that the recognised terms and conditions differed from the position alleged in the claim. It is difficult to know what conclusions can be safely drawn from this. It may be that collective agreements are not so incomprehensible as is sometimes suggested - though, of course, one would expect industry agreements to be a good deal clearer than

domestic ones. On the other hand, it deserves to be stressed that the CAC is on record as stating that the "interpretation of ...agreements ...is often far from easy".<sup>68</sup>

#### Problems of Interpretation

It is valuable to go on to consider the approach of the CAC when faced with questions of interpretation. In one case, the Committee rejected the restrictive interpretation advanced by the employer since "collective agreements are rarely drafted with the care lavished on Acts of Parliament and are not intended to be construed so strictly".<sup>69</sup> The CAC seemed disinclined to regard its awards as precedents, stressing that it was "in duty bound to look at each case on its merits and it is rarely true that the circumstances of one case are precisely the same as another".<sup>70</sup> An example of a case requiring interpretation is Award 78/618.<sup>71</sup> There an agreement provided for a shorter working week for office as opposed to factory staff but there was no indication as to which employees were to work office or factory hours. Did the agreement require jobs to be allocated under each group? No - the CAC having regard to the practice in industry said "it would be for the parties to negotiate its precise application to the range of jobs involved". Let us now look at the Committee's approach to particular areas of difficulty.

#### Change of Circumstances

Since change in circumstances can be rapid in industry a rigid application of the terms of collective agreements would often be out of step with good industrial relations practice. Indeed the CAC has drawn attention to the fact that "disputes often arise from

over-precise wording, where unthinking application to new circumstances gives one side or the other an unexpected and plainly unfair advantage".<sup>72</sup> Award 79/20 concerned a claim in respect of employees who came within the literal terms of an allowance scheme. Certain grades were excluded from the scheme but it appeared to apply to all other employees. However, for reasons which were not clear it was not originally envisaged that the applicant grades would prima facie come within the terms of the scheme. The approach of the CAC appears to have been to look to the aim of the scheme. Since the purpose of the scheme was not to compensate grades of the applicant type they were held not to be entitled to the allowance.

In cases of doubt, looking to the substantive aim of the parties might be thought to have its merits. Regrettably, in a subsequent case the CAC declined to give an expansive interpretation to the collective terms and so allowed an anomaly to stand in the pay structure which had arisen as a result of changes in work practices,<sup>73</sup> so the extent of the CAC's willingness to interpret collective agreements flexibly in the light of changed circumstances must be questioned.

#### Intention to create normative effect

The wording of collective agreements has often weighed against their enforceability - in the Ford Motor Co case the fact that the wording was "composed largely of optimistic aspirations" was taken as one indication of the lack of intent to create legal relations.<sup>74</sup> How then has the CAC dealt with provisions whose wording seems aspirational? An interesting example is provided by



Award No 3. There the collective agreement read that a "(bonus) agreement should stand, but should any company be in serious economic difficulty, the problems should be taken up with the local trade union who would consider the situation". The company stated that it interpreted this to mean that any company in serious financial difficulty was excused payment of bonus. The CAC had no difficulty in rejecting this - effectively severing the element of bargain from the penumbra of goodwill.

Another question is the issue of whether "recommendations" in national agreements could be held to bind the employer. The Committee's predecessor "in general adopted a flexible approach to this, and accepted that this form of words, common in many agreements made by employer's associations, was binding".<sup>75</sup> The Committee has showed signs of following a similar approach.<sup>76</sup>

#### Custom and Practice

The CAC has pointed out that "virtually all agreements are subject to the nuances of prior understandings and subsequent custom and practice".<sup>77</sup> To a certain extent the problem is one of the approach taken by the adjudicatory body - there is a "fear.....that the interpretation of an agreement as if it were a body of clear and precise terms, self-contained and to be understood in the light of the categories of contract interpretation, would distance its spirit".<sup>78</sup> More specifically, difficulties stem from the obscurity of custom and practice and the fact custom and practices can be "inseparably intertwined with rules that happen to find their way into formulated collective agreements, even where they themselves have not been so formulated".<sup>79</sup> The CAC awards examined do not

indicate that custom and practice proved to be a major difficulty for the Committee. Admittedly, custom and practice is less likely to be of importance in the case of industry wide agreements. On the other hand, such questions still arise and the CAC seem ready to take account of it, so the CAC appeared to be willing to interpret collective agreements in the light of custom and practice and to incorporate terms from such practice. Thus in award 78/615 the CAC refused to find the employer in breach of Sch 11 in not paying "increased wage rates from the date specified in the national agreement" in view of the "normal industrial practice for each individual company" to implement the award from the next domestic review date. It might be thought that this was not so much a case of interpretation as a case of the written term being waived in face of the practice. In award 78/307 the collective agreement was silent on whether there should be a minimum level of bonus but provision was made for local negotiation. In view of "the prevailing practice to make such payments" and the fact "that the assumption that such payments will be made appeared to be a powerful influence on the way in which commercial tenders are calculated and commercial contracts awarded" the Committee thought "it right ... that the provisions of a bonus or lieu bonus payment be regarded as a minimum term in this particular employment context". On the other hand, while no rigid formula such as "reasonable, certain and notorious" was deployed, a common works practice might not constitute custom and practice - so a rule of thumb might be rejected.<sup>80</sup> In Award 78/691 the lack of normative import accorded to the practice led the CAC to conclude that despite the absence of a specific wage rate in The National Agreement "a band of payments was possible". Lack of specific

evidence could lead to the disavowal of the alleged custom<sup>81</sup> - eg in Award 372, (though the fact that the collective agreement was quite clear on this point weighed against its modification by reference to custom/practice). Once satisfied as to the existence of the term the CAC displayed creativity in ascribing it content. So in 78/307, while "it was not possible to determine with precision the minimum level of bonus", the Committee derived an actual bonus figure by looking at a related collective agreement.

### Intelligibility

The lack of clarity of collective agreements was on occasion commented on - as the CAC, in Award 145, euphemistically put it "the agreement is not drafted so as to be beyond argument".<sup>82</sup> Indeed, there the CAC contented itself with finding that the claim was well founded and ordering observance of the agreement. The Committee expressly left it to the parties to achieve application of the agreement and suggested that difficulties of interpretation could be left to the industry's joint arbitration committee.<sup>83</sup> Moreover, the awards revealed agreements containing complex pay structures<sup>84</sup> and so on where the intricacy of the agreement was the problem rather than any linguistic difficulty.

### Application

Another area where the C.A.C. has had to consider the normative impact of collective agreements is in considering the application of grading agreements. A number of cases<sup>85</sup> involve highly technical questions as to whether a worker is being accorded a grading status appropriate to the functions he performs. This results in the Committee both applying its industrial relations

expertise and adding to it. Further difficulties arise should the company grading structure be completely out of line with the structure outlined in the National Agreement.<sup>86</sup>

One interesting feature of the Committee's work is their practice of delegating the actual detailed implementation of the award to the parties. The Committee "... seeks to associate the parties as far as possible with the actual construction of the solution".<sup>87</sup> Two reasons might be offered for this. Firstly, it speaks of a desire both to capitalise on the industrial relations knowledge and expertise of the parties and gain a solution most apposite to the requirements of the particular situation. Secondly, "the joint administration of labour-management relations is a means for verifying the goodwill of the parties, for establishing working relationships between them, and, in other words, for building industrial peace on the basis of mutual understanding and co-operation".<sup>88</sup> As the CAC pointed out, if they can state their award in general terms and the parties can jointly agree on the details, "it augurs well for future industrial relations in the company".<sup>89</sup> All in all it speaks of a belief in the values of self-administration and voluntarism.

So in a number of cases having decided that the claim was well founded in principle the Committee has adjourned proceedings to give the parties (or, indeed, the NJC) an opportunity of agreeing the content of the award.<sup>90</sup> This enabled, say, national provisions to be properly adapted to suit local circumstances.<sup>91</sup> Such a process proved particularly useful when detailed, and often difficult, questions of bringing domestic pay structures into line

with national agreements arose.<sup>92</sup> Indeed, on one occasion, "simple acceptance of the application of s 8 would destroy the recently agreed wages structure in each of the societies".<sup>93</sup> However, an "alternative solution appears possible" - the amount of money by which the current salaries fell below the entitlement under the National Agreement was calculated and allocated within the current employment structure. In other cases, rather than adjourn the CAC would simply leave the detailed application of the award to the parties to settle by subsequent negotiation.<sup>94</sup>

This feature of the Committee's work demonstrates the flexibility of its approach and its commitment to finding solutions in accord with the realities of industrial relations. The CAC showed its desire for problem-solving in other ways. Thus on one occasion, while obliged to hold for the employer, it suggested an alternative solution which it hoped the parties would adopt instead of the award.<sup>95</sup> In Award No 78/520 application of para 2(a) of Sch 11 "would have completely destroyed the present society grading structure". The Committee got round this by encouraging the parties to hold further negotiations and present a joint submission based upon claims under para 2(b) of Sch 11. This resulted in a "realistic compromise in a very difficult and complex situation".<sup>96</sup>

It might be suggested that the experience of the CAC shows that, while adjudication on disputes involving collective agreements would pose difficulties - those difficulties would not be of the order sometimes mooted. Difficulties of informality, vagueness, etc., should be less than overwhelming. When one turns to examine actual collective agreements other problems emerge. Looking to

the clauses which regulate the relationship of the collective parties' one finds that statements of obligations, whose language is decidedly "open-texture", pose problems. What of an obligation to "... actively discourage any industrial action until all stages of the agreed procedure have been exhausted". What of a 'recognition' "that when necessary there will need to be a flexible interpretation of this (agreement) to meet the various problems which may arise". Likewise, "staff representatives will ... use their best endeavours to promote good relations between the company and its employees". It is obvious that the degree of creativity required in adjudicating in the face of flexible and general terms could easily convert adjudication into arbitration.

Another difficulty is posed by the fact that the obligations of each side will be regarded as a whole. What then of statements of goodwill, etc, whose nature rendered enforcement very difficult, even though adhesion to them may well be regarded as a precondition of observance of the rest of the agreement? Eg, "the unions agree ... that they support the full utilisation of working hours with particular reference to starting and finishing times". How could an adjudicator deal with this? There would appear to be basically two lines of approach. On the one hand, one could simply sever the aspirational parts on the basis that they were so uncertain. It may be doubted whether this would always be conducive to good industrial relations. On the other hand, if notions of "good faith" were to be looked to a much more interventionist approach might be adopted. If so the adjudicator might still decide in favour of one side or another by severing aspirational aspects of the agreement but might modify his



subsequent award or make it conditional. Alternatively, an adjudicator could decide what would be required by the party in breach to satisfy the aspirational pre-condition. If this had not been done he would be in breach of contract. This would involve the development of a great deal of industrial relations jurisprudence. It would also place a great deal of power into the hands of the adjudicator.

Similar problems exist when one encounters what one might term "agreements to agree". For example, "the number of representatives to be recognised will be reasonable and shall be agreed at each location between management and the appropriate full-time officers ...". Thus there may be a requirement for detailed subordinate rule-making within some general framework. In the absence of agreement one could not regard a dispute as one as to rights. However, it would often be a dispute as to interests within limited bounds. The only solution might be for the adjudicatory body to make an agreement for the parties. One can only conclude that such difficulties again show the futility of measures to compel legal enforcement.

### Conclusions

Assessing the respective merits of different forums for adjudication is far from easy and can be very much impressionistic. The area is also surrounded by a number of assumptions, some of which are somewhat lacking in foundation. Thus it is often taken for granted that the traditional courts are 'accident-prone' in Labour law cases. Yet in Marley v Forward Trust Group<sup>97</sup> it was the tribunals who were guilty of heresy. Again in Burroughs



Machines v Timoney<sup>98</sup> it was the Court of Session who were prepared to take a creative interpretation.

When Donovan reported Britain had no law of unfair dismissal and the redundancy legislation was in its infancy. Since then the tribunals and courts have dealt with a huge number of cases involving employment contracts. As a result, a large number of disputes could have arisen over the meaning, etc., of terms derived from collective agreements. As we have seen, if such a situation has occurred, it is not reflected in the reported case-law. While adjudication in cases involving collective agreements undoubtedly brings its own particular difficulties, so does the adjudication of contracts of other types.

Is it possible to express any concrete opinion as to the most appropriate body to adjudicate? It is suggested that the question be best looked at under a number of headings. First, industrial relations expertise. The composition of both the CAC and the tribunals is obviously designed to reflect this. Nevertheless, as we have seen, knowledge of the background in specific cases may be lacking. However, given this expertise, over time these bodies are less likely to give decisions out of accord with the requisites of industrial relations than the traditional courts. Second, style of interpretation. The CAC has stated that: "The aim is to encourage the approach by way of problem solving rather than by emphasising the aspects of conflict and verdict. Above all, there is a commitment to the principles of sound industrial relations and workable solutions. Whenever, in interpretation of fact or application of rules, the committee finds it is left with

uncertainty or discretion, it is determined to exercise that discretion within this overriding commitment."<sup>99</sup> Given that circumstances may well have changed since an agreement was concluded an adjudicator's approach to interpretation can be of considerable importance. The courts and tribunals are, of course, capable of creativity. On the other hand, there will be occasions when the CAC feels circumscribed by the wording of the agreement. Nevertheless, scrutiny of the CAC awards reveals a very broad and creative approach. Above all, one finds a commitment to the search for 'workable solutions'. One way in which this is demonstrated is the CAC's practice of, on occasion, delegating the detailed implementation of the award to the parties. The CAC's publicly declared policy is also relevant. The express avowals of a 'problem-solving' approach are another factor tending to suggest that the CAC is more likely to adhere to this approach than the court or tribunals.

What then is required of the adjudicator? Enforcing the peace obligation would require the distinction to be made between conflicts of rights and conflicts of interest. I have already argued that the question will often be not whether one can make the distinction but whether one should. An adjudicator will require an extensive, sound knowledge of the practice of industrial relations.

Successful interpretation and application of "rights" requires a broad and realistic approach. The "literal" approach must be rejected in favour of looking "to the real substance of the matters in dispute". A creative role is called for - in particular, to be able to deal flexibly with a situation where a change of

circumstances has occurred. In such a situation the continuing relationship of the parties demands the broadest of approaches. The CAC would seem to be the apposite body.

CHAPTER 9: ADJUDICATION  
 FOOTNOTES

- 1 Shulman, Reason, Contract and Law in Labor Relations, Harv L Rev [1955] Vol 68 999 at 1004
- 2 Cox, Reflections Upon Labor Arbitration, Harv L Rev [1959] Vol 72 1482 at 1504/5.
- 3 'Although lay members are appointed to contribute industrial and commercial knowledge and experience, the contribution is a general rather than a specialised one. No attempt is made to match lay members to the type of case being heard....Some lay members commented that they did not think their particular knowledge or experience was being fully or best used while some others mentioned their lack of knowledge of particular industries as a difficulty in fulfilling their role as lay members. The lack of correspondence between lay members and the nature of the case constrains the extent to which lay members can offer a particularly expert or unique contribution.'  
 (Dickens et al,.....p 60)
- 4 Elkouri and Elkouri, How Arbitration Works, 4th ed, p 123.
- 5 Ibid at 120.
- 6 A I Marsh, Disputes Procedures in British Industry, Research Paper No 2(1).
- 7 Cox, Reflections Upon Labor Arbitration, Harv L Rev [1959] Vol 72 1482 at 1488.
- 8 Shulman, Reason, Content and Law in Labor Relations, Harv L Rev [1955] Vol 68, 999 at 1018.
- 9 Evidence of Sir Roy Wilson to the Royal Commission quoted in K W Wedderburn and P L Davies, Employment Grievances and Disputes Procedures in Britain (1969) at 172. A fourth reason given by Sir Roy was that 'The members of the court prefer not to give reasons because of the practical work in industrial relations which they do outside the court'.
- 10 CAC, annual report 1977, para 4.8.
- 11 Elkouri and Elkouri, op cit, at 428.
- 13 Shulman, op cit, at 1013.
- 14 Elkouri and Elkouri, op cit, at 439.
- 15 Industrial Relations Handbook (1980), Appendix 1.
- 16 This statement is based on an examination of cases produced by a Lexis run.
- 17 [1975] IRLR 104.

- 18 Kahn-Freund's Labour and the Law, 160 (and fn 34).
- 19 1967 ITR 292 (QB); see also Duff v Taylor Woodrow Construction Ltd 1967 ITR 258.
- 20 K W Wedderburn, The Worker and the Law, 128.
- 21 Pearson v William Jones Ltd 1967 ITR 471.
- 22 Op cit at 473.
- 23 Oliver v Hargreaves Transport Ltd [1972] IRLR 7.
- 24 McCulloch v Moore 1967 ITR 289.
- 25 M Roynane v Northern Strip Mining Ltd [1975] IRLR 303 at 304.
- 26 Ibid.
- 27 Ibid.
- 28 [1982] ICR 725.
- 29 [1983] IRLR 360. And see Knox v Down DC [1981] IRLR 452.
- 30 Ibid at 336.
- 31 Ibid.
- 32 O Kahn-Freund, Labour and the Law, (2nd edn) p 128.
- 33 Howman and Son v Blyth [1983] ICR 417. One example of this is the case of Dondan v Kerry Constructions Ltd (discussed, supra 000).
- 34 [1978] IRLR 245.
- 35 Ibid at 246.
- 36 [1986] IRLR 131. See the criticism by B W Napier (1986) 15 ILJ 52.
- 37 Ibid at 132.
- 38 Ibid at 133.
- 39 Ibid at 133.
- 40 Ibid at 133.
- 41 [1967] ITR Vol 2 258.
- 42 Ibid at 260.
- 43 Ibid at 266.

- 44 (1968) 3 ITR 108. eg, Clift v West Riding CC, The Times, April 10, 1964, Wedderburn, Cases and Materials on Labour Law, p 293.
- 45 Ibid at 112.
- 46 A similar confusion arose in Gascol Conversions Ltd v Mercer (1974) ICR 420 (CA) where a statement in a local agreement that it was "not to give rise to any legal obligation" led the Court of Appeal to hold that the local agreement should not be regarded as varying the National Agreement.
- 47 [1986] ICR 115; decision reversed by the Court of Appeal, [1986] ICR 891.
- 48 [1986] ICR 115, 121.
- 49 [1986] ICR 115, 120.
- 50 [1986] ICR 115, 122.
- 51 [1986] ICR 891.
- 52 [1966] 1 QB 555.
- 53 (1977) SC 393.
- 54 This statement is based on a perusal of cases identified by a Lexis search of reported cases containing the word "custom" within 15 words of the word "practice".
- 55 NC Watling & Co Ltd v Richardson 1978.
- 56 B A Hepple & P O'Higgins, Employment Law, (4th edn), p 116.
- 57 P Davies and M Freedland, Kahn-Freund's Labour and the law, 168.
- 58 Samways v Swan Hunter Shipbuilders Ltd [1975] IRLR 190 at 191.
- 59 W Brown, 1972 BJIR 42.
- 60 Ibid at 44.
- 61 [1986] IRLR 477.
- 62 Ibid at para 31.
- 63 [1985] ICR 419.
- 64 CAC Annual Report for 1981, para. 4.2.
- 65 Employment Protection Act 1975, later repealed by s19. Employment Act 1980.
- 66 Award 79/99, para 23 (Chairman R W Rideout).

- 67 For examples: Awards; (40) 2 (41), 49, 78/232.
- 68 CAC Annual Report 1981, paras 4-2, 4-3.
- 69 Award 79/99, para 25.
- 70 Award 78/545.
- 71 See also Award No 131, Award No 78/378.
- 72 CAC Annual Report 1981, para 4-5.
- 73 Award 79/144.
- 74 Ford Motor Co Ltd v AUEF [1969] 2 QB 303.
- 75 Latta 1974 ILJ 215 at 224.
- 76 See Award No 24, Award No 78/618. cf 78/403 where both sides agreed that the recommendation of the JNC was not mandatory but the union argued, ultimately unsuccessfully, that the failure of the employer to implement the upholding of the recommendation by the JNC Appeals Panel was a breach of recognised terms and conditions.
- 77 CAC Annual Report 1981 para 43.
- 78 P Davies and M Freedland, Kahn-Freund's Labour and the Law, (3rd edn) 78.
- 79 Ibid at 76.
- 80 Award 78/691.
- 81 Award 372.
- 82 See also Award No 28.
- 83 Award No 145 para 28.
- 84 Eg Award No 99.
- 85 Eg 79/13. 261. 144. 255.
- 86 See 82/83.
- 87 Wood, Employment Gazette 1979; 15 at 17.
- 88 G Giugni, The Public and Private Ordering of Dispute - Settlement Procedures, in B Aaron (ed), Dispute Settlement Procedures in Five Western European Countries (1969).
- 89 Award No 165.
- 90 Eg Award No 62, 78/520 (1) (2) (3).
- 91 78/525.



- 92 62, 82/3.
- 93 82/3 para 37.
- 94 Eg Award 145. And see 78/192, 170/461.
- 95 Award 78/717.
- 96 Award 78/520, para 20.
- 97 [1986] ICR 115; decision reversed by the Court of Appeal,  
[1986] ICR 891.
- 98 Burroughs Machines Ltd v Timoney 1977 SC 393 reversing [1976]  
IRLR 343.
- 99. CAC Annual Report, 1976 para 5.4.

## CHAPTER 10

### THE LEGAL STATUS OF COLLECTIVE AGREEMENTS

#### IN THE UNITED STATES

##### Historical Development

In the US the common law as to the legal status of collective agreements depended on the approach adopted by the State Courts. Some State Courts regarded collective agreements as binding in honour only. While the position developed that most courts regarded such agreements as contracts a number of legal problems remained. Agreements made might be regarded as contravening the rules on restraint of trade. A trade union party to the agreement may well have been an unincorporated association. More fundamental questions arose from consideration of whether collective agreements merited special treatment in the general laws of contracts. Thus one US Court equated a collective agreement to an employment contract and refused to grant an order for specific performance.<sup>1</sup> While such an approach was unusual Rice concluded that "... the agreement itself is certainly more than a mere "gentlemen's agreement" and, if not a true contract, it has at least come to receive specific performance and enforcement in courts of equity." He continued "... there is no reported decision giving damages for breach of such an agreement, except as it forms a term of an individual contract of employment.. ." <sup>2</sup>

##### Lincoln Mills

The Supreme Court held in 1941 that the purpose of the Wagner Act was "to compel employers to bargain collectively with their

employees to the end that an employment contract, binding on both parties should be made."<sup>3</sup> However, "varying state laws of contract and procedure ... made it highly impracticable if not impossible to secure judicial enforcement of promises in collective bargaining agreements."<sup>4</sup> S 301 of the Taft Hartley Act facilitated the legal enforcement of collective agreements and is of considerable interest.

S 301 states:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labour organisation in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any

individual member or his assets.'

While the section's enactment represented a move towards more extensive legal regulation of collective bargaining judicial interpretation of it was to show considerable regard for voluntarist principles.

One may begin by asking why was s.301 enacted? The US legislature believed that the purpose of an employer in signing a collective agreement was to ensure industrial peace for the duration of that agreement. Promoting legal enforceability was seen as a logical development and a means of securing a greater degree of adhesion to agreements, whereas failure to enforce by specific performance an employer's promise to arbitrate would leave unions with no alternative other than resorting to industrial action. Indeed, it was stated that "The improvement that would result in the stability of industrial relations is, of course, obvious".<sup>5</sup> It was argued that were agreements to be legally enforceable unions would no longer be willing to agree to "no-strike" clauses. This argument was rejected; particular regard being paid to the experience of a number of States where some form of legal enforcement already existed.

In the seminal case of *Lincoln Mills* the Supreme Court gave an influential interpretation of s 301. There the collective agreement provided for grievances to be dealt with under an agreed procedure and barred industrial action until that procedure had been exhausted. The agreement provided for arbitration, at the option of either party, where negotiations had otherwise failed.

In a dispute over work loads the employer refused to go to arbitration. The Supreme Court granted specific performance of the arbitration provisions of the collective agreement. In holding that the District Court had jurisdiction the Supreme Court held that '...s.301(a) is more than jurisdictional - it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements'<sup>7</sup>

The court believed that the intention of the legislature was to promote legally binding collective bargains which also included a 'no-strike' clause. It was felt that a union agreed not to strike in consideration for a right to arbitration. Fairness would therefore demand specific performance. More than that, it was felt that by granting unions a legal remedy they would turn to law rather than industrial action. Industrial peace would thereby be promoted. Whereas failure to enforce by specific performance an employer's promise to arbitrate would leave unions with no alternative other than resorting to industrial action.<sup>8</sup>

The court also had to consider whether the Norris-La Guardia Act prohibited the issue of an injunction. It was acknowledged that a literal reading of the Act might bring the Lincoln Mills dispute within it. However, this interpretation was not followed due to the '... congressional policy in favour of the enforcement of agreements to arbitrate grievance disputes...'<sup>9</sup>

### Individual Enforcement

By virtue of s 9(a) of the National Labor Relations Act a union representing the majority of employees in a bargaining unit has exclusive authority to negotiate with the employer. The Act does not grant the same authority when it comes to the processing of grievances. However, "... unions assert under most collective agreements the exclusive power to process and settle grievances and to carry cases to arbitration".<sup>10</sup> Where such agreements exist an individual's right to have a grievance processed is restricted. "The employee can sue the employer for breach of his rights under the collective agreement only after first showing that the union has acted unfairly in refusing to process his grievance to arbitration; and the employee can sue the union for refusing to process his grievance only upon showing that the union has acted unfairly."<sup>11</sup>

The courts have resisted any temptation to accord individuals anything more than a residual role in legal enforcement, a collectivist stance being adopted which entrusts the interests of labour very much into the hands of trade unions. While this approach is not without its critics the policy justifications for it have been set out in the US periodical literature. First, a number of rights pertain to the union rather than to individual employees. Various organisational rights can be placed in this category, though some rights, eg those of shop stewards, straddle the collective/individual divide and classification might be problematic.<sup>12</sup> Second, in respect of some obligations relating to working conditions the union was the most appropriate plaintiff: "Many of the employer's contract obligations benefit the generality

of employees or sizeable groups without creating identifiable individual interests. The clearest illustrations are promises not to introduce new shifts or change the starting hours without consulting the union. Promises intended to preserve work opportunities belong in the same category so long as there is no violation; even after violation, it may be impossible to show damage to any particular worker."<sup>13</sup> Third, and more interestingly, adjudication through typical grievance procedures was viewed as a continuation of collective bargaining. The nature of collective bargaining meant that the wording of agreements might well be ambiguous; sometimes deliberately so in order to promote a quick settlement. While an individual grievance might occasion proceedings, the process initiated is really part and parcel of collective bargaining. Feller also has an important contribution to make at this juncture: "The specification of a rule in a collective agreement is always subject to the hazard that its application in unforeseen circumstances or its interpretation in unforeseen ways will bring unintended consequences. That hazard is limited to the extent that the parties themselves control the procedure in which disputed questions of interpretation and application are determined and the remedies which can be provided ... The existence of the very rules upon which many individual claims are based is itself dependant upon the absence of an individual right to obtain adjudication of claims of their violation in a forum foreign to the system."<sup>14</sup> In so far as adjudication coincides with collective bargaining it would seem reasonable for the union to control the adjudication process. Fourthly, and related to the previous point, the adjudication of an individual case may have important repercussions for the rest of



the workforce. For example, the resolution of an individual grievance may produce an interpretation of a collective agreement which will benefit one section of the workforce and disadvantage another. The operation of job evaluation schemes is also in point. In such circumstances one can argue that it is valuable that a trade union should decide whether the grievance should be processed and, if so, in what fashion. Thus a union may suggest an interpretation which deals in a reasonable fashion with the actual claimant's grievance but, also, take account of the collective interest. In addition, a union operated "filtering" process would cut down on frivolous claims. Fifthly, placing the processing of grievances in the hands of one union deals with some of the problems caused by multi-unionism. Allowing rival unions to present grievances might lead to the presentation of "... all manners of grievances, regardless of their merit, in an effort to squeeze the last drop of competitive advantage out of each grievance and to use the settlement even of the most trivial grievances as a vehicle to build up their own prestige ... The settlement of grievances could become the source of friction and competition and a means for creating and perpetuating employee dissatisfaction instead of a method of eliminating it."<sup>14a</sup>

The US courts have, therefore, restricted the rights of individuals to have grievances processed. This is despite the fact that the proviso to s 9(a) reads as follows: "... any individual employee or a group of employees shall have the right at anytime to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a

collective agreement then in effect."

In Vaca v Sipes the plaintiff, who had been dismissed, brought an action against the union because they refused to take his grievance to arbitration under the collectively agreed procedure.<sup>15</sup> The Supreme Court held that the plaintiff did not have an absolute right to have his grievance taken to arbitration. Individuals were to be protected by the duty of fair representation. In Vaca the action failed because the plaintiff could not prove arbitrary conduct or bad faith on the part of the union. It was not sufficient for the plaintiff to show that the employer had wrongfully dismissed him. The Supreme Court advanced a number of particular reasons for restricting the rights of the individual. The Court was influenced by the belief that the union performed a valuable role in filtering out frivolous claims. Moreover, "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation".<sup>16</sup>

Following the decision in Lincoln Mills many feared that judicial intervention would increase. A number of cases on "arbitrability" provided evidence of the courts' policy.<sup>17</sup> By virtue of s 301 it falls upon the Courts to decide whether a party has breached a contractual duty to arbitrate. In United Steelworkers of America v American Manufacturing Co a union sought to compel arbitration of a grievance of one of their members.<sup>18</sup> The Court of Appeals for

the Sixth Circuit refused the application on the basis that the grievance was frivolous and not subject to arbitration. The collective agreement provided for arbitration of all disputes as to the meaning, interpretation and application of the provisions of the agreement. The Supreme Court, in allowing the Union's appeal, allotted a restrictive role to the judiciary: "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator."<sup>19</sup> The Supreme Court citing an academic article by Cox to the effect that "The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance and by the dangers of excessive judicial interference".<sup>20</sup> Were the courts to adopt a more active role there would be a danger of becoming involved in the merits of the dispute whilst ostensibly ascertaining if the dispute was arbitrable.

Why the reluctance to intervene? The starting point must be the Supreme Court's perception that Federal policy was in favour of promoting collective bargaining as a means of achieving stable industrial relations. Moreover, arbitration was regarded as being a major component of this policy. The nature of collective bargaining and collective agreements meant that dispute solving mechanisms were of great importance. Collective bargaining seeks to regulate complex industrial activities/relations, often involving many people, on a continuing basis. Difficulties may

arise; for example, an agreement may be found to be incomplete. The Supreme Court believed that "Arbitration is the means of solving the unforeseeable by moulding a system of private law for all the problems that may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement".<sup>21</sup> It was recognised that the dynamic nature of industrial relations imposes special demands on an adjudicator or arbitrator.

The Supreme Court was not only anxious to endorse arbitration in general but to support the particular arbitration process agreed upon by the parties. Collective agreements were regarded as contracts sui generis. Collective bargaining was set against "... the common law of a particular industry or of a particular plant and collective agreements must be interpreted and applied in that light".<sup>22</sup> "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment ... The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed".<sup>23</sup> This position was reinforced by s 203(d) of the Labor Management Relations Act 1947, which provides that final adjustment by a method agreed upon by the parties is the desirable method for settlement of grievance disputes arising over the application or interpretation of a collective agreement.

Such are the policy considerations in favour of judicial restraint that in "hard" cases concerning arbitrability a court should order arbitration to go ahead. A useful illustration of judicial policy is provided by the Supreme Court case of Wiley.<sup>24</sup> The case demonstrates both a desire to preserve the autonomy of the arbitrator from judicial interference and a desire to protect the institutions of collective bargaining from a re-assertion of managerial prerogative. The case raised two issues. First, did a collective agreement providing for arbitration survive a merger? The Court held that the answer to this question depended on the circumstances involved; for example, a "... lack of any substantial continuity of identity in the business enterprise before and after a change ..." <sup>25</sup> might prevent survival. However, the Court was anxious that mergers should not be allowed to thwart the public policy of promoting collective bargaining and private arbitration.

The second issue raised concerned "procedural arbitrability". The employer had argued that "... the question whether "procedural" conditions to arbitration have been met must be decided by the court and not the arbitrator".<sup>26</sup> This argument was rejected. "Once it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."<sup>27</sup> The Court was consumed by a fear of becoming involved with the merits of disputes.

### Judicial Review

Another test of judicial restraint is the way in which the US courts deal with applications for judicial review of arbitrators' decisions.<sup>28</sup> A dictum from the trilogy has proved influential: an arbitrator "... may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."<sup>29</sup> On the whole, the US Courts have been reluctant to hold that an award does not draw "... its essence ..." from the collective agreement. It is only where "... the reasoning is so palpably faulty that no judge or judges, could ever conceivably have made such a ruling then the Court can strike down the award."<sup>30</sup> A judgment of Judge Feiberg, though he was in a minority, has met with subsequent approval.<sup>31</sup> "... the arbitrator looked to the prior practice, the conduct of the negotiation for the new contract and the agreement reached at the bargaining table to reach his conclusion... From all of this, I conclude that the arbitrator's award "draws its essence from the collective bargaining agreement" ... Once that test is met, the inquiry ends".<sup>32</sup>

### "No strike" clauses

In the years following *Lincoln Mills*<sup>33</sup> a major issue for the US Courts was how the Norris-Law Guardia Act was to be reconciled with attempts to legally enforce no strike clauses in collective agreements. In *Sinclair Refining Co v Atkinson*<sup>34</sup> an employer sought an injunction following a number of strikes which, it was alleged, each "... grew out of a grievance which could have been



submitted to arbitration under the contract and therefore fell squarely within the unions' promises not to strike."<sup>35</sup> It was held that the case involved a "labour dispute" within the meaning of the Norris-La Guardia Act and that no injunction could be granted. In Boys Markets v Retail Clerks Union<sup>36</sup> the Supreme Court overturned this decision. This was despite the fact that the Supreme Court in Sinclair had expressed the view that "... the language of the specific provisions of the Act is so broad and inclusive that it leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself".<sup>37</sup> The Court in Boys Market held that the literal terms of the Norris-La Guardia Act had to be reconciled with subsequent legislation. The Court also took into account the perceived policy of promoting industrial peace through arbitration. Resort to arbitration, not self-help, was encouraged. Should the courts fail to enjoin strikes in breach of collectively agreed disputes procedures, they would merely encourage arbitration to be circumvented. Moreover, "... a no strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration ... Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated".<sup>38</sup>

The reversal of Sinclair can be seen as a step towards greater legalisation of the collective bargaining process. The Courts are seeking to direct collective bargaining in a particular direction; conflict is to be channelled and hopefully resolved through the



arbitral process. So in Boys Market legal remedies were tailored to support this. Self-help in the form of industrial action is regarded as out-dated.<sup>39</sup>

Further legalisation occurred with the decision in Gateway Coal Co v Mineworkers.<sup>40</sup> The employer sought to enjoin a strike though the collective agreement did not contain a "no-strike" clause. The dispute was, however, arbitrable under the agreed arbitration clause. A no-strike clause was implied and an injunction granted. The court declared "It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation ... Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."<sup>41</sup>

### Conclusions

Following a rather brief excursus through the US legislation and case law on collective agreements a number of conclusions might be expressed. In general, one might say that the post-war period in the US witnessed changes which facilitated the legal enforcement of collective agreements. Moreover, the Supreme Court developed a policy on enforcement which was to prove to be crucial.

While there was a tendency towards greater legal regulation the courts declined to promote the individual interest. Thus the role of the individual in enforcement was highly restricted. This may seem somewhat surprising to the British labour lawyer who might regard judicial intervention as being synonymous with

individualism. A second notable feature was that while judicial policy supported legal enforcement<sup>42</sup> the judiciary displayed considerable restraint and respected the autonomy of the parties' dispute-resolution procedures. The "Steelworkers Trilogy" demonstrated that the Courts would distance themselves from the merits of disputes and allow private arbitration to take its course. At the same time it must be said that there have been occasions when the courts have been more interventionist.<sup>43</sup> A third feature was that once an area becomes legally regulated the extent of regulation tends to increase. Thus we noted the reversal of the Supreme Court decision in Sinclair by the case of Boys Markets. Finally, an increase in legal regulation may lead to a number of uneasy tensions. For example, despite the general tendency towards restraint, there appears to be a tension between more extensive legal regulation and respect for private dispute settlement. In the years since the steelworkers' trilogy the US courts have become involved in the merits of cases on a number of occasions, under the guise of consideration of arbitrability.<sup>44</sup> Difficult decisions as to approach may also emerge. Thus while Boys Market<sup>45</sup> allows for the enforcement of "no-strike" clauses, this can only occur where the strike is about a matter subject to mandatory arbitration. This leads to the following dilemma. In deciding whether to grant an injunction a court must decide whether the dispute is arbitrable and risk going against the steelworkers trilogy, or presume arbitrarily and risk issuing injunctions which are unwarranted. The case of Gateway<sup>46</sup> seems to suggest that the courts will adopt the former option.<sup>47</sup>

### A Canadian Excursus

A leading Canadian text states that 'Disputes over the meaning of the collective agreement are generally not justiciable in common law courts. In all Canadian jurisdictions, parties to a collective agreement are either compelled or permitted to submit their disputes over the application, interpretation or alleged violation of a collective agreement to arbitration'.<sup>48</sup>

The legislative scheme in Canada is clearly very similar to the United States.<sup>49</sup> In both countries industrial action is regarded as an inefficient and outmoded method of resolving industrial disputes; private arbitration is the preferred method of dispute resolution. Thus the Canadian Supreme Court has stated that 'courts must, in examining awards of arbitrators, particularly in the field of labour relations, do so in the awareness of the role of the arbitrator. Usually he is a technician of considerable expertise in a highly specialised field ... The State speaking through the statute requires that his decision be final and binding. The whole atmosphere of the industrial-commercial arena requires that such differences be quickly and fairly settled by this summary procedure designed as it is to be economical of time and expense.'<sup>50</sup> Thus legislative policy demands considerable judicial restraint when it comes to judicial review.

It is clear, however, that the Canadian courts have been much slower than their US counterparts to act on the legislative policy. It is less clear whether this is because they have failed to perceive it or whether they have simply been reluctant to act upon it. Thus common law notions of freedom of contract have been

deployed to undermine arbitral authority. For example, in the Union Carbide case the courts allowed the collective agreement to reduce the role of arbitration.<sup>51</sup> Again the Supreme Court stated in Port Arthur 'An arbitration board of this type under consideration has no inherent powers of review similar to those of the courts. Its only powers are those conferred upon it by the collective agreement and these are currently defined in some detail. It has no inherent power to amend, modify or ignore the collective agreement'.<sup>52</sup> In the UK we are all too familiar with legislative schemes being undermined by judicial doctrines derived from the common law.<sup>53</sup>

The slow response of the Canadian courts to the requirements of legislative policy was strongly criticised in an 1971 article. 'The Canadian courts have adopted a position that is antithetical to the steelworkers trilogy. Little if any deference is accorded to grievance arbitration. Furthermore, there is no indication that the Canadian courts appreciate the institutional considerations involved. The Canadian cases ... seldom consider the American decisions.'<sup>54</sup>

A difference of approach between the Ontario Court of Appeal and the Supreme Court as regards judicial review of arbitration awards emerged in Port Arthur Shipbuilding Co v Arthurs.<sup>55</sup> In that case the arbitrator found that the employees had committed the acts of misconduct alleged but decided that a lesser penalty than dismissal should be imposed. The collective agreement provided that 'The Union recognises the management's authority to manage the affairs of the company to direct its working forces, including the right to

hire, transfer, promote, demote, suspend and discharge for proper cause any employee...'<sup>56</sup> In the Court of Appeal it was stated that 'The collective agreement leaves the extent of discipline (be it as light as a warning or as heavy as discharge) at large under the formula of "proper cause". By this I mean that there are no fixed consequences for specified types of misconduct'.<sup>57</sup> This interpretation would appear to have a lot to commend it. The Supreme Court held that there was an error of law on the face of the record. It was held that 'The task of an arbitration board called upon to arbitrate a "grievance over ... discharge" under these circumstances is to determine whether there was proper cause and having found that the employees did absent themselves to work elsewhere it is bound to decide that proper cause existed. In substituting periods of suspension for dismissal the board exceeds its power and assumes the function of management and determines, not whether there was proper cause, but whether management, having proper cause, should have exercised its power of dismissal.'<sup>58</sup> Whilst this more managerialist interpretation is not implausible one must doubt whether a US court would have regarded the arbitrator's interpretation as being so unreasonable as to be impermissible.

A number of comments must be made. First, the Canadian courts distinguish between statutory and consensual arbitration. In the case of the latter the courts are a good deal more reluctant to intervene.<sup>59</sup> Second, the Canadian courts have become, with the passage of time, less interventionist. In 1983 the Supreme Court adopted the following dictum as to the scope of review: '...was the Board's interpretation so patently unreasonable that its

construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?'<sup>60</sup> It has also been judicially stated that '... the law of review has evolved, even in the absence of a privative clause, to a point of recognition of the purpose of contractually-rooted statutory arbitration: namely, the speedy, inexpensive and certain settlement of differences without interruption of the work of the parties".<sup>61</sup>

The 1979 case of Hertis v NB Electric Power Commission<sup>62</sup> was very similar to Port Arthur. Admittedly the statutory provisions and the collective agreement involved were somewhat different. Nevertheless, the Supreme Court appeared to be acting upon a different philosophy: 'There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained.'<sup>63</sup> In the Newfoundland Association of Public Employees case the Supreme Court suggested that the decision in Port Arthur might require reconsideration.<sup>64</sup>

On the other hand, a somewhat different approach to that in Port Arthur had been taken in the earlier Supreme Court case of Imbleov v Laskin et al.<sup>65</sup> The case concerned judicial review of an arbitral award concerning a complaint that a union had violated a no-strike clause. The arbitrator had upheld the complaint and

awarded damages. It was submitted that the collective agreement gave no express power to award damages and that the arbitrator had erred in construing the agreement as giving such a power. The agreement expressly precluded the arbitrator from altering any of the provisions of the agreement or from giving any decision inconsistent therewith. In upholding the decision of the arbitrator the Supreme Court appeared to take a purposive view of the labour legislation. Given that industrial conflict was ruled out it was felt that it was important that the remedy of damages should be available.

It appears that the Canadian courts are more willing to adopt an interventionist stance over the issue of procedural arbitrability. In Union Carbide<sup>66</sup> the grievance procedure provided that as a condition of submitting a dispute to arbitration the union had to give ten days written notice to the company. It was held that the arbitrator had no jurisdiction where claims were submitted late in time. It was said that 'once the board found that the grievance was out of time, this should have been the end of the matter'.<sup>67</sup> A decision to the contrary would have been a breach of the clause of the collective agreement which stipulated that the arbitrator should '... not in any way amend, modify or change any of the provisions of this agreement ...'.<sup>68</sup>

It should be noted that s 34(1) of the Labour Relations Act provides that 'Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of



the agreement, including any questions as to whether a matter is arbitrable'. Having regard to this provision the Ontario Court of Appeal had held that the union was entitled to succeed. After all, it might be thought that the parties could not contract-out of s 34(1). The Supreme Court rejected any such line of argument without any great deliberation. Beatty has cogently argued that 'In return for surrendering the right to strike, labour was compensated with the right to arbitrate all questions arising during the life of the agreement that arose out of that agreement... If fundamental complaints of either party over their respective rights and obligations in the agreement are not peacefully resolved, an attitude will develop that one must effect a resolution by industrial coercion regardless of its legality. The policy of industrial peace in section 36 can only be effected if section 37 is given a full and unyielding interpretation, denying the parties the opportunity to circumvent, limit, restrict or subordinate the mechanism contained therein.'<sup>69</sup>

The position would appear to be different in respect of substantive arbitrability. In Re Ontario Hydro and Employees' Union<sup>70</sup> the question arose whether an arbitrator had jurisdiction to hear and determine a grievance of a probationary employee notwithstanding a term in the collective agreement barring the resort to arbitration on behalf of a probationary employee. It was held that such a term in a collective agreement was void as being contrary to the Labour legislation. The Ontario Court of Appeal noted that to decide otherwise would undermine the legislative policy of insisting that all rights disputes go to arbitration. Thus once a matter was collectively agreed it was not possible to exclude a

dispute over that matter from arbitration.<sup>71</sup> On the other hand, 'this ... does not mean that the parties cannot agree to a basis of arbitral review that would render the result of arbitration a foregone conclusion. This was not done here, but the parties might have agreed, for example, that probationary employees may be discharged on the sole discretion of the employer. This would make a discharge almost impossible to overturn'.<sup>72</sup>

An important issue arises over the individual's right of access to arbitration. 'The general rule is that, regardless of whether a grievance may be an individual grievance, it is the union that has the right to take the grievance to arbitration. Individual employees are not permitted to take their grievances to arbitration on their own even where they are prepared to assume the costs of the process. It is only possible for employees to have access to arbitration in their own right where the language of the arbitration provision in the collective agreement expressly so provides. Language to this effect is not commonly found in Canadian collective agreements, and the usual situation is that the trade union has the exclusive right to bring employee grievances to arbitration.'<sup>73</sup> In General Motors v Brunet<sup>74</sup> the Supreme Court took into account s.88 of the Labour Code which states that 'Every grievance shall be admitted to arbitration in the manner provided in the collective agreement if it so provides and the parties abide by it; otherwise it shall be referred to an arbitration officer chosen by the parties or, failing agreement, appointed by the Minister'. The Labour Code defines grievance as meaning any disagreement respecting the interpretation or application of a collective agreement. Under the collective agreement in Brunet

the union had the sole right to decide if employee's grievances should go to arbitration. Clearly in the event of a dispute as to the interpretation or application of a collective agreement an individual employee had no right to initiate arbitration. In addition, an employee cannot circumvent the arbitration provisions by raising a dispute with an employer over the application or interpretation of a collective agreement in the courts.<sup>75</sup>

The Supreme Court has seen fit to impose natural justice type requirements on the operation of arbitration procedures by unions. In Hoogendoorn v Greening Metal Products a dispute arose when an employee, Hoogendoorn, refused to pay a compulsory check-off.<sup>76</sup> The union and the company agreed to submit the dispute to arbitration and the union contended that the company was in breach of the collective agreement. The Supreme Court held that the sole aim of the arbitration proceedings was the securing of Hoogendoorn's dismissal. The court went on to find that 'It cannot be said that Hoogendoorn was being represented by the union in the arbitration proceeding. The union actively took a position completely adverse to Hoogendoorn. It wanted him dismissed.'<sup>77</sup> It was held that breach of the requirements of natural justice vitiated the proceedings and, in particular, that Hoogendoorn had a right to be heard in his own right given that the union was adopting a position adverse to his.

The decision attracted considerable criticism in certain quarters. After all collective decision-making requires that a union must be allowed to judge which competing interest to pursue. There may, of course, be scope for a residual duty such as the duty of fair

representation. However, the decision to invoke the arbitral process and the presentation of the grievance are matters for the union. Giving individuals the right to be heard will involve added burdens in terms of time and expense. The problem would be accentuated when a number of individuals were involved and, indeed, it may often be unclear just how many individuals should be allowed to attend. The minority in the Supreme Court believed that the majority view conflicted with the legislative scheme: 'The scheme of the Labour Relations Act, RSO 1960 c 202, is to provide for a bargaining agent which is given power to conclude an agreement with an employer, on behalf of the employees of that employer, which agreement becomes binding upon all employees... No individual employee is entitled as of right to be present during bargaining or at the conclusion of such an agreement. To require that notice and the right to be present be given to each employee on any occasion when a provision in a collective agreement having general application to all employees was being interpreted would be to destroy the principle of the bargaining agent and to vitiate the purpose of the Act.'<sup>78</sup>

One commentator went as far as to say that '... the foundation of the collective bargaining regime - the exclusive authority of the union to represent employees in the bargaining unit - would be destroyed, if at arbitration the affected employee(s), (and presumably the grievor) were permitted to intervene as of right. The intention of the OLRA to substitute a collective agreement for individual contracts of employment would be thwarted'.<sup>79</sup> It must be said the granting of procedural rights, such as the right to be heard, would be unlikely to be responsible for such catastrophic

consequences.

In assessing the policy of the courts in respect of individual rights of enforcement over collective agreements one can clearly detect divergences between the approach in the US and Canada. Both systems extend the union control over collective bargaining into the arena of collective agreement administration. Nevertheless the Canadian courts have adopted a more individualist stance and have burdened the operations of the grievance procedures with procedural restraints. The US courts are content to let individuals depend on the residual duty of fair representation. This may be because the Canadian courts have been much slower to take on board legislative policy in arriving at decisions. Again the courts in Canada have on occasion shown a tendency to seek assistance from common law concepts rather than comparable US experience.

CHAPTER 10: THE LEGAL STATUS OF COLLECTIVE AGREEMENTS  
IN THE UNITED STATES

FOOTNOTES

- 1 Morris Glushien, note 16 Cornell LQ 1930 p 96 at 97.
- 2 William Gorham Rice, Jr, 'Collective Labor Agreements in American Law' 1930-31 Harv L Rev, Col 44, p 572 at 604.
- 3 HJ Heinz Co v NLRB, 311 US 514.
- 4 R A Gorman - Basic Text on Labor Law (1976), p 544.
- 5 Textile Workers Union v Lincoln Mills 353 US 448 at 1005.
- 6 Textile Workers Union v Lincoln Mills 353 US 448.
- 7 Ibid at 977-978.
- 8 Textile Workers Union v Lincoln Mills 353 US 448 at p 979. 'Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal court over labour organisations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organisations and that industrial peace can be best obtained only in that way.'
- 9 Textile Workers Union v Lincoln Mills 353 US 448, p 982.
- 10 C W Summers, The individual employee's rights under the collective agreement, 1977 UPL Rev 251 at 256.
- 11 However, 'In a case in which the union refuses to process the individual's grievance, the proviso to section 9(a) permits the individual employee and the willing employer to adjust the grievance in spite of the union's absence.' To that extent, the union's control over grievance resolution is less embracing than in matters of "bargaining". Gorman, p. 393-4 founding on Emporium Capwell Co v Western Addition Community Organisation 1975 US.
- 12 See ch 6.
- 13 Cox, Rights Under a Labour Agreement, 1956 Harv L Rev 601, 613. Cox continues: 'Thus a contract which bars foremen from working with their hands preserves the pool of work available to rank-and-file employees, but violations seldom result in demonstrable injury. An undertaking not to subcontract work of a kind currently done in the plant increases the hope of overtime and diminishes the risk of lay-offs. Shifting such work to another company may result in lay-offs for which individuals can claim compensation but sometimes there are no identifiable damages. In the latter case the union must act as spokesman for all the employees if the promises are to be enforced. The group interest is no less when the violation results in layoffs or reduction of overtime.'

- 14 Feller, Collective Bargaining Agreement, 1973, Cal L Rev 663, 854.
- 14a Cox, 1956 Harv L Rev 601, 626.
- 15 Vaca v Sipes 386 US 171.
- 16 Ibid, at 853. However, the Supreme Court added that "An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures ... In such a situation (and there may of course be others) the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's course of action." (Vaca at 855)
- 17 Especially the "steelworkers trilogy":  
United Steelworkers v American MFG Co 363 US 564; United Steelworkers v Warrior & G Nev Co 363 US 574; United Steelworkers v Enterprise Corp 363 US 593.
- 18 363 US 564.
- 19 Ibid at 1407.
- 20 Ibid.
- 21 United Steelworkers v Warrior & G Nav Co 363 US 574 at 1416.
- 22 Ibid at 1415.
- 23 Ibid at 1417.
- 24 Wiley & Sons v Livingston 376 US 543.
- 25 Ibid at 905.
- 26 Ibid at 908.
- 27 Ibid at 909.
- 28 R A Gorman, Basic Text on Labor Law (1976), Ch 25.
- 29 United Steelworkers v Enterprise Corp 1960 363 US 593 at 597.
- 30 Safeway Stores v American Bakery & Co LIV, Local III 390 F 2d 79 (1968). Cf the dictum of Lord Greene MR in Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1 KB 223.
- 31 Torrington Co v Metal Products Workers Union 362 F 2d 677.
- 32 Ibid at 683-684.
- 33 Textile Workers Union v Lincoln Mills 353 US 448.



- 34 (1962) 370 US 195.
- 35 Ibid at 443.
- 36 398 US 235.
- 37 370 US 195 at 446.
- 38 Boys Market v Retail Clerks Union 398 US 235 pp 208-209.
39. It will be recalled that in Lincoln Mills the union was the plaintiff.
- 40 414 US 368.
- 41 Ibid at 595. See further, W B Gould IV, Strikes, Dispute Procedures and Arbitration - Essays on Labour Law, ch 6.
- 42 Textile Workers Union v Lincoln Mills 353 US 448.
- 43 See eg R A Gorman - Basic Text on Labor Law (1976), p 559.
- 44 See P L McDonald 1983 Duke LJ 848.
- 45 Boys Market v Retail Clerks Union 398 US 235.
- 46 Gateway Coal Co v UMW 414 US 368 (1974) cf Buffalo Forge v United Steelworkers 428 US 397 (1976)- on which see, WB Gould IV, Strikes, Dispute Procedures and Arbitration - Essays on Labor Law, ch 6.
- 47 Cf Cantor 1980 Wis L Rev 247 at 277.
- 48 Arthurs, Carter and Glosbeek, Labour Law and Industrial Relations in Canada, p 51.
- 49 See G W Adams, 1971. Os H L J Vol 9, p 443.
- 50 Douglas Aircraft Co of Canada Ltd v McConnell 99 DLR (3d) 385 at 419 per Estery J.
- 51 Union Carbide Canada Ltd v Weiler 1968 70 DLR (2d) 333.
- 52 Port Arthur Shipbuilding Co v Arthur et al (1968) 70 DLR (2d) 693.
- 53 For example, the Court of Appeal in Notcutt v Universal Equipment [1986] IRLR 218 has over-ruled the attempt of the EAT in Harmon v Flexible Lamps Ltd [1980] IRLR 418 to restrict the effect of the common law doctrine of frustration of contract.
- 54 G W Adams, 1971 Os H L J Vol 9, p 443 at 491-492.
- 55 62 DLR (2d) 343, overruled by 70 D L R (2d) 693.
- 56 70 DLR (2d) 693 at 695 per Judson J.

- 57 62 DLR (2d) 343 at 363 per Laskin JA.
- 58 70 DLR (2d) 693 at 696 per Judson J.
- 59 Brown and Beatty, Canadian Labour Arbitration, pp 40-41; eg Shelensky v Board of Governors Regina Pasque Hospital 145 DLR (3d) 413.
60. Laskin CJC in re Alberta Union of Provincial Employees et al and Board of Governors of Olds College 136 DLR (3d) 1, 7 adopting Dickson J in Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp (1979) 97 DLR (3d) 417. See also Douglas Aircraft Co of Canada Ltd v McConnell 99 DLR (3d) 385 at 406.
- 61 Douglas Aircraft Co of Canada Ltd v McConnell 99 DLR (3d) 385 at 406 - Estey J. It is acknowledged that earlier cases may have purported to intervene on a similar basis but it is only latterly that the courts have, in fact, adhered to this. As one commentator stated '... Metropolitan Life ... and Port Arthur Shipbuilding ... were reversed by a Supreme Court of Canada which at the time adhered to and practised an aggressive and activist philosophy of judicial interference with the decisions of labour tribunals. A decade later the Supreme Court had itself become a convert to the Laskin theory of judicial restraint.' Beatty and Langille, *Bora Laskin and Labour Law: From Vision to Legacy* (1985) 35 U of TLJ 672 at 720.
- 63 Hertis v NB Electric Power Commission 1979 98 DLR (3d) 622 at 631.
- 64 Newfoundland Association of Public Employees v Attorney-General of Newfoundland 1977 75 DLR (3d) 616.
- 65 1962 SCR 338.
- 66 Union Carbide Canada Ltd v Weiler 1968 70 DLR (2d) 333. See also General Truck Drivers Union v Hoer Transport 1969 4 DLR (3d) 449.
- 67 Union Carbide Canada Ltd, *ibid* at 335.
- 68 *Ibid*.
- 69 D M Beatty, *Procedural Irregularities in Grievance Arbitration*, 1974, McGill Law Journal, Vol 20, p 378, 383/384. It may be noted that 'There are two basic statutes in Ontario dealing with the arbitration of grievances in the private sector, the Labour Relations Act and the Rights of Labour Act. Of the two, the former, and more particularly section 44 (formerly section 37), is the primary provision relating to the arbitration of grievances. It requires that collective agreements must include a provision for arbitration, and sets out a number of provisions relating to the power of arbitrators and the enforcement of awards. Section 44 which has, with some variations, analogies in all of the other

jurisdictions, provides:

(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) If a collective agreement does not contain such a provision as is mentioned in subsection (1), it shall be deemed to contain the following provision...'

Brown and Beatty, Canadian Labour Arbitration, pp 4-5.

- 70 Re Ontario Rights and Ontario Employees' Union Local 1000 et al, 1983 147 DLR (3d) 210.
- 71 Morden J A was somewhat more cautious at 147 DLR (3d) 210, 223: 'In my view, unless the "matter" which is included in the collective agreement is capable on the facts of the case of giving rise to a justiciable issue, and in his respect it would not be so capable unless (in the present context) it involved the conferral of a right on the employee against the employer, then I do not see how it could give rise to any arbitrable difference.'
- 72 Re Toronto Hydro-Electric and CUPE III DLR (3d) 693 at 697.
- 73 Arthurs, Carter and Glasbeek, Labour Law and Industrial Relations in Canada, p 263.
- 74 General Motors v Brunet [1977] 2 SCR 537.
- 75 For a discussion of earlier developments on an individual employee's right to sue an employer, see Adell 1967 Can Bar Review, 354.
- 76 Re Hoogendoorn and Greening Metal Products 1968 65 DLR (2d) 641.
- 77 Ibid at 649 per Hall J.
- 78 Ibid at 644, per Judson J.
- 79 S A Tacon, The Effect of Judicial Review on Grievance Arbitration, 1976 Os H L J 661 at 699.

## CHAPTER 11

### REFORM

Whilst the Donovan Commission<sup>1</sup> did not recommend that collective agreements should be made legally enforceable they did not reject the idea in principle. Indeed the Commission indicated that once their recommendations had been carried out there might be a role (albeit a residual one) for legal sanctions to enforce collective bargains.<sup>2</sup> The purpose of this chapter is to re-examine the question and, in particular, to consider whether post-Donovan changes in industrial relations have made legal enforceability a realistic option. At the outset one must distinguish two things. On the one hand, legislative moves to compel observance of collective agreements, eg "by removing immunity from industrial action in breach of an agreement",<sup>3</sup> and, on the other hand, legally enforceable contracts entered into of the parties' own volition.

Donovan examined the issue of legal enforceability essentially in the context of solutions to the problem of strikes which were both unofficial and unconstitutional. There were, though, a number of obstacles on the road to legal enforceability.

The British attachment to the "dynamic" or common law method of collective bargaining was said to stand in the way of legal intervention. Clegg has stated that the common law model '...starts with an agreed disputes procedure to resolve differences between the parties. Any dispute may be referred to the procedure which resolves it by reference to any relevant substantive rule

there may be between the parties, or to a custom which appears to be generally accepted by the parties, or by finding a compromise which is acceptable to the parties. For the model recognises no sharp distinction between disputes of right ... and disputes of interest ... Industrial action is allowed whenever the procedure has failed to resolve a dispute, or whenever one party has given notice to terminate an existing substantive agreement and the notice has expired. In this model, agreements have no fixed term, and there is no need for a single comprehensive agreement. Substantive matters can be regulated by as many agreements as the parties choose to make.'<sup>4</sup>

Clegg contrasts resolving a dispute by reference to any relevant substantive rules with finding a compromise which is acceptable to the parties. Thus going hand in hand with "dynamic" or "common law" bargaining is said to be the irrelevance of the Continental conflicts of rights/conflicts of interest distinction. Collective bargaining being "... a continuous process in which differences concerning the interpretation of an agreement merge imperceptibly into differences concerning claims to change its effect".<sup>6</sup>

This view may be somewhat exaggerated - "rights" after all are not so opaque as to be incapable of incorporation into individual employment contracts. In chapter 9 it is suggested that the Courts and Tribunals have been able to establish the terms of collective agreements without too much difficulty in most cases. On the other hand, the rights/interests distinction is considered irrelevant in the context of dispute-solving. Thus British procedures do not usually distinguish "between the process of

applying and interpreting existing agreements as against the process of formulating new ones".<sup>7</sup> Putting it another way, the same procedure is likely to be used for both contract administration and contract negotiation in opposition to those who believe "... that rights procedure inherently requires a "judicial" rather than a conciliatory function". However, others argue that "... a conciliatory function is in some circumstances not only more appropriate but often the only realistic way of approaching a situation where the rights involved are not laid down with clarity and the problem is therefore not so much to discover what the facts are - the decision then being automatic - as to establish in the light of the facts what should be done to the satisfaction of both parties so that the situation can be resolved".<sup>8</sup> A different line of argument is advanced by Singleton who has stated that "substantive consequences of some importance may turn on questions of interpretation and the intention of the parties on any disputed matter are seen by the parties as a further question of interest for discussion and settlement by them rather than as matters of construction of the terms of the written agreement. To use the ... [rights/interest distinction] ... as a general basis for defining the arbitrable issues would require fundamental changes in the nature and status of collective agreements. It is however a distinction which may be useful to parties who are seeking to identify and define arbitrable issues within their own agreements".<sup>9</sup>

It therefore does not necessarily follow that one cannot determine what the "rights" actually are. The importance of dynamic bargaining then being not that it renders collective agreements



incapable of legal enforcement but that it casts a good deal of doubt on the wisdom of doing so. Again trade unionists may be wary of moves to promote a distinction between rights and interest disputes lest this becomes a precursor of restrictions on the right to strike over conflicts of rights.<sup>10</sup>

The model of collective bargaining generally regarded as being more amenable to the legal process is the statute law model. This is described by Clegg as being evidenced as '... a substantive agreement on all matters currently subject to joint regulation. This agreement governs relations between the parties until it reaches the end of its term when a new agreement is negotiated. In the meantime it is the job of the procedure laid down in the agreement to settle disputes about its interpretation. Disputes about matters outside the agreement cannot be settled by the procedure but must await the termination of the agreement when they may be resolved by amendments or extensions to the agreement if the parties are willing. Industrial action is permitted only at the end of the agreement as a means of reaching a new agreement.'<sup>11</sup> The fundamental point being that, even in the absence of law, industrial relations operate on the basis of the rights/interests distinction. It must be noted that Donovan focused mainly on private manufacturing industry (especially engineering), and other sectors (especially the public sector) bear a much closer resemblance to the "contractual" or "statute" law model.<sup>12</sup> Thus disputes in the public sector are more likely to be disputes of interpretation.

One must note, however, that the non-existence of the



rights/interests distinction is apposite in areas where the "primitive bargaining model" may exist. Clegg listed those as discipline, redundancy and the organisation of work.<sup>13</sup> In such areas there may be no collective agreement or at least no commitment to the collective bargaining process: management stands on its prerogative, workers on custom, both sides taking the view that "their respective rights entitle them to make rules and to take industrial action to impose on the other side".<sup>14</sup> So here "it is not possible to use procedure as an instrument of interpretation and application as such because in many cases it is the existence of rules themselves which is being questioned rather than the content of the rules as such".<sup>15</sup> Accordingly, one can hardly enforce an agreement which does not exist and it is therefore futile to attempt to make the rights/interests distinction. Such "bargaining" is a private sector phenomenon; - moreover, its extent is uncertain.<sup>16</sup> In addition, the parties could move from this style of bargaining if they wished.

In conclusion, the "dynamic" method is not a universal bar to legal enforceability. Certain employment sectors (eg public) bear a much closer resemblance to the "statute" law or "contractual" model. So in Britain, in the public sector, while "... apart from specific instances of fixed term agreements ... notice can be given at any time to revise or add to any substantive agreement ... at any one time these agreements constitute the agreed rules governing employment in the industry ..."<sup>17</sup> Moreover, even within the manufacturing industry heartland of dynamic bargaining, significant moves towards greater formalisation have taken place.

Donovan drew attention to Britain's dual system of collective bargaining - the Britain of the conflicting "formal" and "informal" systems. The informal system was said to be marked by "the predominance of unwritten understandings and of custom and practice".<sup>18</sup> This informality was another difficulty in the path of legal enforcement though such a judgment was again to some extent caused by focusing on private manufacturing industry. In any event the intervening years have seen an important increase in the formality of industrial relations in manufacturing industry. Thus there have been very substantial changes in the system of pay bargaining in Britain.<sup>19</sup> Methods of payment have changed, the use of piecework has declined and the use of job evaluation has increased as has the use of incentive schemes with standards set in time. Moreover, "there appears to have been a trend away from individual to group and plant-wide incentive schemes".<sup>20</sup> As a result pay bargaining is less informal and less fragmented. In addition the importance of single-employer bargaining has grown considerably - at both plant and corporate level<sup>21</sup> and with it the likelihood of agreements being in writing has increased. Such a development accords with the Donovan prescription for greater "order in industrial relations". The lack of enterprise bargaining in the 1960s inhibited the conclusion of comprehensive, formal agreements which actually regulated terms and conditions of employment. The distinction between market and managerial relations is important: the former meaning pay and the hours of work and the latter meaning the deployment, organisation and discipline of the labour force.<sup>22</sup> Once one moves away from the development of formality in market relations and looks at collective bargaining over managerial relations a different picture

emerges. There has been little formalisation of agreements on the conduct of work and agreements these still tend to be unwritten. Moreover, the view has been expressed that "there is no reason to believe that collective bargaining over managerial relations will become more formal in the future".<sup>23</sup> Sissons and Brown go on to argue that while '... some management opinion may still argue for the legal enforceability of collective agreements, the absence of formal agreements covering the deployment and organisation of labour works to management's advantage when workers' bargaining power is weak. The absence of codification makes it easier to force through changes in works practices.'<sup>23</sup> Having said that, there is no disguising the existence of more formal and more comprehensive agreements which have real regulatory effect - potentially reducing the scope for informal work group bargaining.

One must, however, explore in more depth what formalisation may mean. One might assume that industrial relations have become more formal simply by acknowledging that more agreements are being made in writing. On the other hand, even when such agreements are effectual, a system may well contain a significant element of informality. This point may be illustrated by looking at one study which demonstrates that workers may not wish to use and abide by the provisions of a new formal system:

First, the workers may not like the new rules, or at least may consider that they can be improved. Secondly, workers may be more prepared to challenge formal plant-level rules than they were to challenge the same understandings in a C & P form. This preparedness is tied up with a lower degree of commitment to the

new rules, and a feeling of a loss of personal control over their working lives. Thirdly, where these conditions apply, and the workers are in a position to put pressure on foremen, this tactic will be the most logical and likely one for them to apply. Fourthly, the likely outcome of such low-level negotiations will be informal rules and understandings.<sup>24</sup>

Systems which are ostensibly formal may therefore be supplemented or to some extent even supplanted by informal agreements or understandings.

Formalisation must be distinguished from legalisation. If a more formal system of industrial relations is to be successful there must be a commitment to its operation. By converting to greater formality the parties may nevertheless intend that any agreement will be operated flexibly. Legalisation, on the other hand, might be thought to carry with it considerable rigidity and the parties may not wish to commit themselves to this.

Adopting greater formality (for example, formalising existing works practices) can be a difficult and time-consuming affair. However, if sufficient care is not taken over matters such as the clarity of drafting then problems are likely to emerge in the near future. Parker found that 'the degree to which agreements were operated as the parties intended at the outset generally related closely to the thoroughness with which they were prepared and introduced ... In the few cases where careful attention was also paid to the introduction and explanation of agreements relatively few problems of misinterpretation arose.'<sup>25</sup> Moreover, 'Perhaps the most important factor in the successful operation of agreements was the

degree of sophistication and determination applied to their administration by senior management and personnel departments on the company side and by senior lay representatives on the union sides, after the initial introductory phase'.<sup>26</sup>

It is clear that informality is most likely to be prevalent at the lower points of workplace organisation. Workers, for example, may obtain concessions on the shopfloor through the actions of lower level management. Alternatively, if at this level workers unilaterally abrogate collectively agreed working arrangements resort to the legal process by management would scarcely be appropriate. Apart from anything else a trade union might not be vicariously liable (see p 338). In any event the cost and delay, to mention but two factors, in resolving a standard dispute over piecework through the courts would rule out any legal action. It is worth recalling at this juncture that much more has occurred in the way of formalisation in the sphere of market relations compared to managerial relations. It falls to be considered what implications this has for legal enforcement. Looked at from the point of view of management, and given that a union would not be vicariously liable for much of what happened on the shopfloor, it would not detract from the enforcement of a union's commitment to the peace obligation or indeed any substantive obligation.

Since informality at workshop level may often be the product of management concession to workgroup pressure this is unlikely to be of concern to the union hierarchy. Terry draws attention to the advantages that informality can have for workers: '... first ... [formalisation]... would encounter strong resistance from senior

management which might jeopardise the de facto concessions, and secondly, that there are tactical advantages which informal rules have over formal ones. In particular, informal rules allow whichever is the stronger party at the procedural level, or place within the workplace, where the rules operate to behave in a way which the other side might find hard to predict. Such an advantage is itself a power resource, and the party which benefits from it is unlikely to wish to see that situation altered'.<sup>27</sup>

The foregoing discussion suggests that formalisation, let alone legalisation, is unlikely to achieve a tight grip on certain work activities. In industries where this is the case moves towards having legally enforceable collective agreements would be likely to be a limited exercise further up the hierarchy. It must be said of course that the formality of work relations varies considerably between different industries.

#### The Problem of Sanctions

While Donovan had no objection in principle to the use of legal sanctions for the enforcement of collective agreements<sup>28</sup> in the context of a solution to the unconstitutional strikes issue Donovan rejected the various legal solutions mooted.<sup>29</sup> The 1941 Betteshanger Colliery dispute showed "... the fruitlessness of the use of penal sanctions for the purpose of enforcing industrial peace".<sup>30</sup> Donovan concluded that the only potential way "to enforce an agreement is through civil actions for damages" but it was felt that employers would be unlikely to use the civil law.<sup>31</sup> Would the active participation of the employer, essential to any enforcement process, now be forthcoming? Recently, evidence has



emerged "... to dispel any sense that employers have been uniformly or unswervingly committed to an abstentionism which rules out the invoking of the civil law ..."<sup>32</sup> Therefore this hurdle may not be the absolute one it once was.

Whom to sue? Often it would be clear that a trade union was party to the agreement. What though of the difficulty raised by Donovan as to "whether a shop steward or shop steward's committee bargaining at plant or workshop level could, in the legal sense, be regarded as acting for the union or unions concerned, or for the individual workers ..."?<sup>33</sup> As Lord Justice Roskill emphasised "it is ... from this element of duality in the position of shop stewards that the difficulties in establishing responsibility for their actions arise".<sup>34</sup> Heaton's case shows both the difficulty and the fact that "the position of other unions and of other shop stewards in other industries will or may vary greatly".<sup>35</sup> Of course, a statutory definition of vicarious liability could be enacted.<sup>36</sup>

No matter how clear the question of parties became one is still left with the problem of unofficial action. The State might go further and legislate so that trade unions had a duty to "endeavour to prevent its members from committing unlawful offensive actions", or, where they have occurred, "to endeavour to cause such members to cease committing such action".<sup>37</sup> Such a proposal would be open to a whole host of objections flowing from the view that while "trade union leaders do exercise discipline from time to time ... they cannot be industry's policemen".<sup>38</sup> It has been suggested that "the power of the work group has been reduced, and shop



stewards have become more integrated into the union's official structures, with a consequent tendency towards greater centralised control by union officials over the strategy and tactics of disputes".<sup>39</sup> The extent of this tendency might be questioned. In any event, other evidence indicates that while the role of shop stewards might have been formalised the strength of decentralised power should not be under-estimated.<sup>40</sup> Shop steward organisation has to some extent become more centralised (often at plant level) and more sophisticated. There is a close link between the formalisation of collective-bargaining at plant or company level and in some cases increased power of the stewards (and the workforce they represent). "The formal negotiating arrangements have in the main been adapted to include them and the concomitant rise of single-employer bargaining has increasingly made stewards into the principal negotiators and guarantors of clear-cut factory agreements and procedures",<sup>41</sup> so that "the full-time official assists rather than dominates the steward".<sup>42</sup> While this is not to say that stewards may not, on occasion, be more remote from the work groups they represent than at the time of Donovan,<sup>43</sup> it does not appear to be the case that trade union organisation is now sufficiently integrated to enable unions to be "industry's policemen".

In a case where a trade union was party to an agreement would a court order be obeyed in the event of breach?<sup>44</sup> Evan's research into the use of injunctions in industrial disputes between September 1980 and September 1984 revealed that 'The outcome, in legal and industrial relations terms has been mixed. With few exceptions, all the injunctions up until News International v Forey

were complied with and the industrial action or dispute terminated. Where they continued, their effectiveness was undermined since the injunction had the effect of losing the support of other workers eg delivery drivers, and the action eventually petered out... After those early cases the use of injunctions met more resistance. Injunctions were ignored in disputes involving larger and more powerful groups ... and in disputes where senior union leaders were more whole-heartedly committed to providing support ...<sup>45</sup> These findings, however, are in relation to use of the new statutory restrictions on the taking of industrial action and the union response might well be different in relation to legally enforceable collective agreements voluntarily entered into. One must, though, consider what unions would gain from legal enforcement.

Kahn-Freund wrote that "it is not a gross exaggeration to say that the contractual function of collective agreements is mainly for the benefit of management and its normative function mainly for the benefit of labour".<sup>46</sup> When it comes to substantive terms though individual employees will be able to enforce a number of them by suing on the individual employment contract. If an action by the collectivity were felt desirable the enforcement of industry agreements would prevent under-cutting - always a likely event in a recession. Given that industry agreements now often set merely a "safety-net" - and not even a "floor" - this would often be meaningless. Enabling a union to enforce through law a domestic agreement would put an additional restraint on employers reneging on agreements voluntarily entered into. One could also enforce obligations which regulated the relationship between the collective parties, for example, the provision of union facilities. Again an

obligation to go to, and abide by the results of, arbitration could be enforced.

The issue of status quo clauses must also be dealt with. 'A status quo arrangement in a dispute procedure comes into operation when there is a dispute over a change or proposed change in existing terms and conditions of work; the arrangement deals with the status of the change or proposed change pending the resolution of the dispute or the exhaustion of the procedure.'<sup>47</sup> In any discussion of legally enforceable collective agreements the issue arises in the context of the peace obligation. Anderman has argued that 'most proposals for legislation and indeed actual enactments providing for legally enforceable collective disputes procedures, have shown little understanding that no-strike obligations in disputes procedures would be viewed by trade unions party to such procedures or indeed any workers to whom such obligations might be extended, as qualified by some form of status quo limitation on managerial prerogatives'.<sup>48</sup> It is submitted that there appears to be less of a problem when legally enforceable collective agreements, and not simply legally enforceable disputes procedures, are looked at. Where you had a collectively agreed clause on working arrangements then if management decided to act upon a new interpretation of this then the trade union side might allege breach of contract. Given the doctrine of mutuality in contract law, even in the absence of an express status quo clause, in the face of an employer's breach of contract a trade union would no longer be bound to exhaust procedure before taking industrial action. Had an express status quo clause been in the agreement the position would have been just the same. An express clause

might be valuable, however, to clarify the status of working practices which were not contained in written collective agreements but were the subject of custom and practice.

It may be doubted, therefore, whether sufficient "consideration" would be on offer, in most cases, to attract union interest in a legally enforceable agreement. There are further difficulties, though, in enforcing the peace obligation. Donovan had emphasised "... the absence of speedy, clear and effective disputes procedures".<sup>49</sup> Particularly damning was the informality of procedures. Those that were written were often "loose and imprecise" - and would often be informally applied. Agreements might be less than comprehensive in scope (as in building). Often, though, agreements would be unwritten - oral agreements and custom and practice prevailing.<sup>50</sup> This led Marsh to conclude that "unless greater formality were introduced, any labour court would be in the position, not of an adjudicator and imposer of an appropriate penalty, but of a conciliator".<sup>51</sup>

The post-Donovan period, though, has been marked by an increase in the coverage of procedures and an increase in their formalisation.<sup>52</sup> Questions remain as to the "scope and specificity of such procedures".<sup>53</sup> However, "... there is no simple choice between formal and informal systems of bargaining. All collective bargaining systems are a mixture of the two".<sup>54</sup> Informality may have different roles. It may fill gaps to expedite the formal process or it may simply enrich an already workable procedure.<sup>55</sup> It may function as an alternative. One recent survey indicates that adherence to the formal procedures

might well be greater than is sometimes suggested.<sup>56</sup> On the other hand, it has been said "... that some informality is both inevitable and desirable as an expression of human relations, not merely technical ones, as recognition that no procedure can fit the needs of all situations, and as a pre-requisite for a problem solving approach to grievance resolution".<sup>57</sup> Whatever the true position may be there is no disguising the variation in the degree of formality - both intra and inter industry.

#### Compelling Enforcement: In Perspective

Since Donovan there have been significant changes in the manner in which collective bargaining is conducted. The conflicting formal and informal facets of the dual system have disappeared - much formalisation and centralisation have taken place. The practice of "dynamic" bargaining may not be the bar to legal enforceability that is sometimes suggested. Moreover, sectors of the economy not dwelt on by Donovan were, and are, more amenable to the legal process. It even might be possible to deploy effective sanctions on occasion. Other difficulties - such as the problem of adjudication- may be less than insuperable.

None of this detracts from the tremendously wide and complex variety of British collective bargaining practices. To take but one example - the continued importance of what Clegg has styled the primitive bargaining model. Accordingly, any attempt to inject forcibly the law into the enforcement of collective bargains would enable it to be deployed in circumstances where the institutional conditions for its successful operations were not present. For example, where a loose, imprecise and open-ended procedure

agreement was in operation. Moreover, "effective dispute handling depends on a flexible and delicate interaction of formal and informal process against the background of the common but tacit understanding of the parties".<sup>58</sup> Imposition of the law would be likely to be highly prejudicial to working relations. The "rule of law" in industry "assumes sufficient common interest and understanding between the parties to make the rules work".<sup>59</sup> The Ford case illustrates the damage that can be done to industrial relations by the use of the legal process when that use conflicts with customary modes of behaviour.

The position changes when one considers the position of parties opting for legally enforceable collective agreements. We have seen that collective bargaining has become a good deal more formal since Donovan. Given that parties who wished legally enforceable contracts could presumably overcome any difficulties that remain, the productivity agreement of the early 1960s<sup>60</sup> show what can be achieved in the way of formal, comprehensive agreements when this is mutually desired. Underlying much of the work of the Donovan Commission is the assumption that collective bargaining could be a good deal more formal. Also it is hard to disagree with Marsh that "decisions arrived at in voluntary procedures are more likely to be kept".<sup>61</sup> The parties can provide for "status quo clauses", adequate consideration and so on which will make for a mutually satisfying agreement. A body such as the CAC could perhaps function as a suitable adjudicator.

At the end of the day the acid test must be: "What can the law do to help to improve our industrial relations?"<sup>62</sup> The technical

obstacles to legal enforceability may not be as great as is sometimes depicted but that is not an argument for legal enforceability. Use of legally enforceable contracts should only be made where an employer and a trade union feel it would be to their mutual benefit. It is to be expected that most parties will prefer to reject the use of the law and the more static bargaining that would result in favour of the flexibility offered by the traditional arrangements. At the end of the day "it is a matter of social expediency, not of social ethics".<sup>63</sup> The sentiments expressed in the following quotation being viewed as sound: '... labour relations are primarily human relations, ... the situations arising are so complex, so varied, so uncertain in their frequency and intensity, that they cannot be forced into a predetermined set of procedural channels ... At the lowest levels in particular, it is not feasible in most instances to operate in a legalistic way; a foreman needs flexibility to avoid cumbersome rules, or to prevent minor transgressions of them on occasion, if he is to obtain willing co-operation'.<sup>64</sup>



## CHAPTER 11: REFORM

FOOTNOTES

- 1 Royal Commission on Trade Unions and Employers' Associations, Cmd 3623.
- 2 Ibid at para 508 et seq. And see the discussion by H A Clegg-Otto Kahn-Freund and British Industrial Relations in Wedderburn et al (ed) Labour Law and Industrial Relations, chp 2, esp pp 19-22.
- 3 Trade Union Immunities: Cmd 8128, 56. Historically, of course, there have been a number of measures to promote adhesion to collective agreements.
- 4 H A Clegg, The Changing System of Industrial Relations in Great Britain, p 117.
- 5 Ibid.
- 6 A I Marsh: Royal Commission on Trade Unions and Employers' Associations. Research Paper No 2 (Pt 1) at VIII.
- 7 Ibid.
- 8 TUC Evidence to the Royal Commission - "Trade Unionism", paras 317-319.
- 9 N Singleton, Industrial Relations Procedures, London: HMSO 1975, at 58.
- 10 P A L Parker et al, The Reform of Collective Bargaining at Plant and Company Level, p 21.
- 11 H A Clegg, The Changing System of Industrial Relations in Great Britain, p 116.
12. H A Clegg, op cit, 117.
- 13 H A Clegg, op cit, pp. 119-123.
- 14 H A Clegg, op cit, 123.
- 15 A I Marsh: Royal Commission on Trade Unions and Employers' Associations. Research Paper No 2 (Pt 1), p 17.
- 16 W W Daniel & N Millward: Workplace Industrial Relations in Britain, see 197-199. It may be noted that joint disciplinary procedures were found to be more common than is sometimes suggested.
- 17 H A Clegg, op cit, at p 117.
- 18 Donovan, op cit, at 117.

- 19 W W Daniel and N Millward: Workplace industrial Relations in Britain, chps 7 and 8. G S Bain (ed), Industrial Relations in Britain, chp 6.
- 20 K Sisson and W Brown, Industrial Relations in the private Sector: Donovan Re-visited, in G S Bain (ed), Industrial Relations in Britain, p 141.
- 21 W Brown (ed), The Changing Contours of British Industrial Relations, chp 2.
- 22 K Sisson and W Brown, Industrial Relations in the Private Sector: Donovan Re-visited in G S Bain (ed), Industrial Relations in Britain, p 137.
- 23 K Sisson and W Brown, Industrial Relations in the Private Sector: Donovan Re-visited in G S Bain (ed), Industrial Relations in Britain, p 153.
- 24 M Terry, 1977 BJIR p 76 at 87.
- 25 P A L Parker et al, The Reform of Collective Bargaining at Plant and Company Level, p 53.
- 26 Ibid at 54.
- 27 M Terry, 1977 BJIR p 76 at 88.
- 28 Donovan, op cit, para 502.
- 29 Donovan, op cit, paras 477-499.
- 30 Donovan, op cit, para 486 and Appendix 6.
- 31 Donovan, op cit, para 502.
- 32 Evans 1983 ILJ 129 at 146. cf Weekes et al, Industrial Relations and the Limits of the Law, pp 201-212.
- 33 Donovan, op cit, para 477.
- 34 Heatons Transport v TGWU (1972) ICR 308, 367.
- 35 Ibid at 359.
- 36 As was done by s 15 Employment Act 1982. Problems of allocating responsibility also arise when a number of unions negotiate jointly. Thus in Ford case, supra, "the proposition was put forward that where a number of agents (the NJNC representatives) are charged with negotiating or agreeing, unless there are express enabling powers (which there were not), the agents cannot limit their principals (the unions) unless they are unanimous". Lewis 1970 BJIR 313, 326.
- 37 Donovan, op cit, para 481.
- 38 Donovan, op cit, para 122.

- 39 Evans, 1983 ILJ 129 at 147.
- 40 M Terry, Shop Steward Development and Managerial Strategies, in G S Bain (ed), Industrial Relations in Britain, chp 3.
- 41 W Brown (ed), The Changing Contours of British Industrial Relations, p 79.
- 42 Ibid at 70.
- 43 Donovan op cit, paras 96 et seq. See also E Batstone, Working Order, chp 2.
- 44 There is always the possibility that damages may be sought at a later date. A ceiling on the amount recoverable would be necessary (cf s 16 Employment Act, 1982).
- 45 S Evans, 1985 BJIR p 134-5.
- 46 P Davis and M Freedland (ed), Kahn-Freund's Labour and the Law at 162.
- 47 S Anderman, 4 ILJ 1975, 131.
- 48 Ibid at 139.
- 49 Royal Commission on Trade Unions and Employers' Associations, Cmd 3623, para 475.
- 50 Royal Commission on Trade Unions and Employers' Associations, op cit, chp 8.
- 51 A I Marsh: Royal Commission on Trade Unions and Employers' Associations. Research Paper No 2 (Pt 1).
- 52 W W Daniel and N Millward: Workplace Industrial Relations in Britain, chp 7. W Brown (ed) The Changing Contours of British Industrial Relations, pp 42-47. It should also be noted that the adoption of time-limits has become increasingly common. "The main exceptions are those incorporated in industry-wide agreements where it is not possible to specify time limits to apply equally to all firms in the industry". (1983 IRRR 309 at 8).
- 53 Thomson and Murray, Grievance Procedures at 74 suggests they were often of a low level though this may have changed.
- 54 H A Clegg, The Changing System of Industrial Relations in Great Britain, 240.
- 55 W W Daniel and N Millward: Workplace Industrial Relations in Britain, 169.
- 56 W W Daniel and N Millward: Workplace Industrial Relations in Britain, 169.

- 57 Thomson and Murray, Grievance Procedures, 130.
- 58 Hyman: Dispute Procedures in Engineering, p 93.
- 59 A I Marsh, Research Paper No 2(1) Royal Commission on Trade Unions and Employers' Associations, p 3.
  
- 60 For example, see Research Paper No 4, Royal Commission on Trade Unions and Employers' Associations.
- 61 A I Marsh, op cit at viii.
- 62 Royal Commission on Trade Unions and Employers' Associations, op cit, para 458.
- 63 Kahn Freund's Labour and the Law, op cit, p 61.
- 64 Thomson and Murray, Grievance Procedures, 129.

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